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CH. 41
PROSECUTOR

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§41-1
Conduct and Comments Generally

Darden v. Wainwright, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986) The prosecutor's closing argument, which called defendant an "animal," indicated that defendant was on furlough from a prior sentence and implied that only the death sentence would guarantee defendant would not commit similar acts, was improper. The conviction was affirmed, however, because the remarks did not misstate evidence or "implicate other rights of the accused such as the right to counsel or the right to remain silent," many of the remarks were invited by the defense, the jury was instructed that arguments were not evidence and the " the evidence . . . was substantial."

Buckley v. Fitzsimmons, 509 U.S. 259, 113 S.Ct. 2606, 125 L.Ed.2d 209 (1993) Prosecutors are entitled to absolute immunity from §1983 liability for actions performed as advocates for the State. However, they are entitled to only qualified immunity where their acts would not ordinarily be performed by advocates. Prosecutors were acting as investigators when they attempted to determine whether a bootprint left at the scene of the crime had been made by the defendant. Because they were performing a function which would normally be performed by police officers, only qualified immunity attached and this immunity did not protect prosecutors from liability for intentionally falsifying evidence. Finally, because making comments to the press is not a duty required of an advocate, only qualified immunity attached where the prosecutor made false comments to the media concerning evidence.

Portuoendo v. Agard, 529 U.S. 61, 120 S.Ct. 1119, 146 L.Ed.2d 47 (2000) The defendant's constitutional rights to attend trial, confront witnesses, and testify in his own behalf were not violated by the prosecutor's argument that "unlike all the other witnesses," defendant had been in the courtroom during the entire trial and could therefore tailor his testimony to the evidence. **Griffin v. California**, 380 U.S. 609 (1965), which prohibits prosecutorial comment on a defendant's failure to testify, does not prohibit comment on the fact that the defendant's presence at trial affords him an opportunity to fabricate testimony, which is a "natural and irresistible" inference which the jury may draw from the defendant's presence in the courtroom.

People v. Johnson, Cowley & Parker, 208 Ill.2d 53, 803 N.E.2d 405 (2003) A "pattern of intentional prosecutorial misconduct may so seriously undermine the integrity of judicial proceedings as to require reversal under the plain error doctrine." The court noted its previous criticism of prosecutorial misconduct, and found that such misconduct continues despite threats of reversal and "words of condemnation and disapproval." Here, prosecutors committed plain error where they obtained admission of the blood-and-brain-splattered police uniform of a decedent, displayed that uniform on a mannequin, presented emotional and irrelevant testimony by the decedent's father, introduced "transparently inflammatory testimony" concerning the oath which the decedent had taken when he became a police officer, and made closing arguments intended to invoke the jury's outrage. The court also criticized the prosecutor for referring to the proximity of a school to the offense where that fact was irrelevant to any issue, and for making irrelevant, "[t]hinly veiled, emotion-laden appeals to

the jury, meant to intensify improper evidence previously introduced and to reinforce the poignancy of the [decedent's] family's loss." The court stated:

> [P]rosecutorial misconduct . . . undermines the very foundations of our criminal justice system. Our system of justice requires that a defendant's guilt or innocence be determined based upon relevant evidence and legal principles, upon the application of reason and deliberation by a jury, not the expression of misdirected emotion or outrage by a mob. Though perhaps not as egregious as the prosecutors' misconduct in these cases, we are seeing such behavior with an "alarming" frequency, which "causes legitimate public concerns regarding the fairness and integrity" of criminal trials. . .
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> Misconduct on the part of prosecutors cannot be allowed to continue unchecked. To call it "error" is to mischaracterize it, as it represents nothing less than an attempt to subvert a defendant's fundamental right to a fair trial. Multiple instances of this kind of conduct in the course of a criminal trial threaten the trustworthiness and reputation of the judicial process . . .
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> [T]his court will take corrective action to preserve the integrity of the process. . . We mean it as no hollow warning when we say that prosecutors risk reversal of otherwise proper convictions when they engage in conduct of this kind.

People v. Wheeler, 226 Ill.2d 92, 871 N.E.2d 728 (2007) The Supreme Court reversed defendant's conviction for first degree murder, finding that the prosecutor's closing arguments were improperly designed to inflame the passions of the jury and create an "us-against-them" atmosphere. The court noted that in some instances, the prosecutor continued improper arguments after the trial court sustained defendant's objections and instructed the jury to disregard. In some such instances, the defendant's follow-up objections were overruled. Although the act of sustaining an objection and properly admonishing a jury is generally sufficient to cure the prejudice from an improper closing argument, the salutary effect of sustaining an objection is eliminated where the prosecutor persists in the improper argument, particularly where the trial court thereafter permits the improper argument to continue. The court concluded that the prosecutor made several improper arguments.

A. The prosecutor erred by presenting himself as a lone "champion" attempting to avenge the death of the deceased, and by complaining that he was outnumbered by the four defense attorneys, whom he portrayed as wanting to present the jury with inaccurate information and portray police witnesses as "liars." The court noted that the prosecutor had sought a death sentence, which under Supreme Court Rule 416 required the appointment of two attorneys for each defendant. Furthermore, opposing severance of the cases, the prosecutor required the defendants to be tried simultaneously.

B. The prosecutor improperly analogized the defense attorneys to "Monday morning quarterbacks" who were not "risking their lives" at the scene of the crime and who operated under "rules of the game" in which police officers were required to be perfect witnesses. The prosecutor also acted out a fictional dispatcher's response to a mock 911 call - claiming that police officers could not respond to emergency calls because they were busy typing reports that would stand up under the scrutiny of defense attorneys.

C. The prosecutor also erred by criticizing defendant's former counsel - a sitting judge

at the time of trial - as giving testimony that was "revolting to any person who values the truth" and which could be compared to the testimony of Bill Clinton concerning Monica Lewenski.

D. The prosecutor erred by asserting that defense attorneys were trying to mislead the jury by introducing crime scene photographs that had been taken during the summer and which did not reflect the lack of foliage at the time of the offense. Defense counsel stated that the photos were offered only to show the physical structures, and offered to stipulate that the pictures did not accurately portray the vegetation at the time of the crime. Because the evidence was closely balanced, there was no forensic evidence connecting defendant to the crime, and the credibility of the police witnesses was a critical factor in the jury's decision to convict, the improper argument was a material factor in the conviction.

People v. Kirchner, 194 Ill.2d 502, 743 N.E.2d 94 (2000) Although a capital defendant ordinarily has no right to argue residual doubt at a death hearing, defendant claimed that such argument was invited at his sentencing by the State's improper argument concerning the sufficiency of the evidence presented at trial. "Defendant has provided us with no authority for the proposition that an improper argument by defense counsel must be permitted when invited by the State's argument."

People v. Kuntu, 196 Ill.2d 105, 752 N.E.2d 380 (2001) . The prosecutor committed plain error at the death hearing by describing a statutory mitigating factor - absence of a prior record - as an aggravating factor. Because the legislature has determined that the absence of a prior criminal record is a statutory mitigating factor, the prosecutor erred by "change[ing] the legislative scheme" and converting that factor to one "that weighs in favor of sentencing a defendant to death." The prosecutor also erred by arguing that because defendant had killed seven people and Illinois law requires a mandatory life sentence for killing two people, defendant would get "five free murders" if he received a natural life sentence. The argument was not an accurate statement of the law but simply an "inflammatory" statement "with no basis in either law or fact."

People v. Woolley, 205 Ill.2d 296, 793 N.E.2d 51 (2002) The prosecutor should "refrain from making [an] emotional religious appeal for the death penalty." (During closing argument, the prosecutor stated: "When Christ was on the cross there were two thieves with him, and he forgave the good thief and he promised him salvation in the next life, but he did not stay the execution").

People v. Nelson, 193 Ill.2d 216, 737 N.E.2d 632 (2000) The prosecutor committed plain error by arguing that the jurors would fail to live up to their oaths if they acquitted the defendant. Under Illinois law, such arguments constitute fundamental error and deny a fair trial.

People v. Harris, 129 Ill.2d 123, 544 N.E.2d 357 (1989) During closing argument, the prosecutor stated that the jurors had "a unique opportunity to actually do something about crime on your streets. . . . You are the only ones that sit between this man, this ticking bomb, and that door" The Court held that these remarks were proper. The prosecutor is allowed " to dwell upon the evil results of crime and to urge the fearless administration of the law."

People v. Heflin, 71 Ill.2d 525, 376 N.E.2d 1367 (1978) Generally, an improper comment in

closing argument is cured or rendered harmless when the trial judge sustains a defense objection and admonishes the jury to disregard. See also, **People v. Franklin**, 135 Ill.2d 78, 552 N.E.2d 743 (1990); **People v. Harris**, 129 Ill.2d 123, 544 N.E.2d 357 (1989); **People v. Shum**, 117 Ill.2d 317, 512 N.E.2d 1183 (1987); **People v. King**, 109 Ill.2d 514, 488 N.E.2d 949 (1986); **People v. Baptist**, 76 Ill.2d 19, 389 N.E.2d 1200 (1979). Compare, **People v. Emerson**, 97 Ill.2d 487, 455 N.E.2d 41 (1983) (sustaining of objection did not cure error); **People v. Fletcher**, 156 Ill.App.3d 405, 509 N.E.2d 625 (1st Dist. 1987); **People v. Wolf**, 178 Ill.App.3d 1064, 534 N.E.2d 204 (3d Dist. 1989).

People v. Lucas, 132 Ill.2d 399, 548 N.E.2d 1003 (1989) An improper closing argument is generally not reversible error unless it constituted a material factor in the conviction or resulted in substantial prejudice to the defendant. See also, **People v. Lyles**, 106 Ill.2d 373, 478 N.E.2d 291 (1985); **People v. Caballero**, 126 Ill.2d 248, 533 N.E.2d 1089 (1989); **People v. Hayes**, 173 Ill.App.3d 1043, 527 N.E.2d 1342 (5th Dist. 1988). Compare, **People v. Threadgill**, 166 Ill.App.3d 643, 520 N.E.2d 86 (2d Dist. 1988) (error held to be reversible); **People v. Hayes**, 183 Ill.App.3d 752, 539 N.E.2d 355 (1st Dist. 1989); **People v. Thomas**, 146 Ill.App.3d 1087, 497 N.E.2d 803 (5th Dist. 1986).

People v. Fluker, 318 Ill.App.3d 193, 742 N.E.2d 799 (1st Dist. 2000) While prosecutors are allowed wide latitude in closing argument, it is improper to "do or say anything" which has the sole effect of inflaming the jury's passions or arousing prejudice. Here, the prosecutor attempted to turn the case "into a referendum on attitudes toward gangs" by arguing that: (1) the "only issue" was whether gangs would "control" the court system and society, (2) acquitting defendant would allow him to "make a mockery" of the judge and jury, and (3) if the jury let defendant "walk out that door" it might as well "give him a robe and make him a judge."

People v. Herrero, 324 Ill.App.3d 557, 756 N.E.2d 234 (1st Dist. 2001) The prosecutor erred by commenting negatively on defendant's decision to elect a jury trial, including: (1) asking in opening arguments why the defendants wanted a jury trial, and (2) after a defense objection was sustained, stating that defendants were "gamblers" who "live on the edge" and hoped to "sucker in" one of the jurors. However, the comments were harmless.

People v. Ellis, 315 Ill.App.3d 1108, 735 N.E.2d 736 (1st Dist. 2000) "When the State intends to notify a judge who is to sentence a witness with a pending case of that witness' cooperation, such notification constitutes a benefit to the witness" and must be disclosed whether or not there is a formal agreement concerning disposition of the existing charges. See also, **People v. Diaz**, 297 Ill.App.3d 362, 696 N.E.2d 819 (1st Dist. 1998) (the prosecution improperly failed to disclose evidence favorable to the defendant where the record showed an implicit agreement whereby the witness agreed to testify against the defendant in return for reduced sentences on pending cases; even if no actual agreement was shown.)

People v. Paris, 295 Ill.App.3d 372, 692 N.E.2d 848 (4th Dist. 1998) Due process is violated where the State allows evidence which it knows to be false to go uncorrected - the prosecutor is required to disclose "any understanding or agreement" made to obtain the testimony of a witness, including any "unspoken understanding." However, where prosecutors, judges, and (in certain circumstances) criminal defense attorneys and reporters are called to testify, the "special witness" doctrine may apply. Under this doctrine, the defense must make a plausible showing that the evidence is material and favorable by setting forth the testimony he expects to elicit,

an explanation of its relevance and necessity, and the efforts made to secure the evidence through alternative means. Here, the trial court's decision to quash a subpoena under the "special witness doctrine." was upheld because the prosecutor and one of the defense attorneys indicated that no firm arrangement had been reached with the witnesses and that no negotiations had taken place before defendant's trial.

People v. Ward, 326 Ill.App.3d 897, 762 N.E.2d 685 (5th Dist. 2002) 725 ILCS 210/4.01, which authorizes the State's Attorney's Appellate Prosecutor's Office to assist county State's Attorneys in prosecutions under the Illinois Controlled Substances Act, the Narcotics Forfeiture Act, and the Illinois Public Labor Relations Act, and to appear in the trial court on tax objections, did not authorize the Appellate Prosecutor to act as the trial-level prosecutor in a case brought under the Cannabis Control Act. Although a trial court has discretion to appoint an attorney to assist the State's Attorney (55 ILCS 5/3-9008), the record contained no evidence that the trial court entered a formal appointment order. Because a conviction obtained by attorney who is not properly acting as a prosecutor is void, the issue was not waived.

People v. Arrington, 297 Ill.App.3d 1, 696 N.E.2d 1229 (2d Dist. 1998) Any conflict of interest which arose because the State's Attorney was related to the owner of the store which defendant attempted to rob was insufficient to require appointment of a special prosecutor. Under 55 ILCS 5/3-9008, the court "may appoint some competent attorney to prosecute or defend [a] cause or proceeding" where the State's Attorney is interested in a case which he has the duty to prosecute or defend. Whether to appoint a special prosecutor lies within the discretion of the trial court, however, and the need for appointment varies with the nature of the prosecutor's interest. Where a *per se* conflict of interest is involved (such as the State's Attorney previous representation of the defendant on the same charge), the State bears the burden of showing that a special prosecutor need not be appointed. Where no *per se* conflict of interest is involved, the defense has the burden to show the need for a special prosecutor. Where the State's Attorney's interest is "personal" rather than professional, a special prosecutor is required only if the conflict of interest involves significant emotional ties or the defendant suffers "actual and substantial" prejudice. See also, **People v. Shick**, 318 Ill.App.3d 899, 744 N.E.2d 858 (3d Dist. 2001) (appointment of a special prosecutor not required when defense counsel became an Assistant State's Attorney; because counsel was not the elected State's Attorney and had no management duties, and "counsel made solemn promises" not to reveal confidential information.)

People v. Brooks, 345 Ill.App.3d 945, 803 N.E.2d 626 (1st Dist. 2004) The Appellate Court held that the prosecutor's closing argument misstated the law regarding the presumption of innocence, but did not constitute plain error. Citing **People v. Crespo**, 203 Ill.2d 335, 788 N.E.2d 1117 (2001) the court held that a reviewing court may reach an unpreserved error only if the error affected the defendant's substantial rights and seriously affected the "fairness, integrity, or public reputation of judicial proceedings." Although the prosecutor's argument (that when the jury reaches the jury room the presumption of innocence "is gone") misstated the law, neither defendant's substantive rights nor the fairness of the trial were undermined where the misstatement occurred only once and during the prosecutor's opening argument, which was followed by defense argument, proper rebuttal by the prosecution, and appropriate instructions.

People v. Hayes, 353 Ill.App.3d 578, 819 N.E.2d 341 (3d Dist. 2004) Although the Appellate Court found that the prosecutor did not commit plain error in closing argument, it stated:

> [W]e nevertheless take this opportunity to caution prosecutors to refrain from making comments such as, "Send the defendant back to jail" and "Send him a message." References to a defendant's residency at the county jail improperly imply that the defendant is a bad man deserving of punishment; and sending messages, whether to defendant, to the police or to society, is not the jury's job. It is wrong to imply that the guilty verdict form may be used for any purpose other than a finding that all elements of the offense were proved beyond a reasonable doubt. We anticipate that savvy prosecutors will refrain henceforth from including "back to jail" and "message sending" comments in their closing arguments.

People v. Junior, 349 Ill.App.3d 286, 811 N.E.2d 1267 (4th Dist. 2004) Due process is violated where the State knowingly uses perjury to obtain a criminal conviction. A conviction must be reversed where there is a reasonable likelihood that perjured testimony could have affected the jury's verdict. The same principles apply where the State does not solicit perjured testimony, but allows such testimony to stand uncorrected. The duty to correct false testimony is triggered whenever any representative or agent of the prosecution knows that a witness's testimony is untruthful. Due process was violated at defendant's trial for burglary and residential burglary when the State failed to correct the perjured testimony of a co-defendant.

People v. Liner, 356 Ill.App.3d 284, 826 N.E.2d 1274 (5th Dist. 2005) The defendant was charged with armed robbery and home invasion. The eyewitnesses identified the masked offenders because the eyewitnesses said they were the same individuals who had come to the house earlier asking to purchase marijuana. Another witness, who was in jail, testified that he saw the defendant with two guns the month before the robbery. Defendant and his witnesses testified to an alibi defense. The Appellate Court reversed, finding several instances of prosecutorial misconduct to be plain error. (1) The court found that when the defense established that the jailed witness disliked defendant, this did not invite the State to elicit, under the doctrine of curative admissibility, that he disliked defendant because defendant sold him fake drugs, tying defendant to other crimes. This error was compounded when the prosecutor argued that Liner owned a Cadillac and had nice clothes because of his drug trade. (2) Additionally, it was improper for the prosecutor to suggest the defendant was a bad person because he spent $20 on marijuana when that money was needed to support his elderly relatives. (3) It was also improper to bring in evidence of defendant's possession of an additional gun and of one victim's medical and anxiety problems that resulted from the offenses, because such evidence was irrelevant. (4) Finally, the prosecutors improperly inflamed the jurors' passions by arguing the jurors should find the defendant guilty to protect other children in the county and to send a message.

People v. Young, 347 Ill.App.3d 909, 807 N.E.2d 1125 (1st Dist. 2004) Under **People v. Johnson**, 208 Ill.2d 53, 803 N.E.2d 405 (2003), a pattern of intentional prosecutorial misconduct may undermine the integrity of the proceeding to such a degree that reversal is required although the evidence is not close. Here, the prosecutor committed plain error by: (1) asking defendant several times to comment on the veracity of State's witnesses, (2) misstating the jury's responsibilities and the State's burden of proof, (3) cross-examining the defendant regarding his post-arrest silence, (4) commenting on prior bad acts and other crimes despite rulings on motions *in limine*, (5) improperly vouching for the credibility of witnesses,

and (6) interjecting his own opinions regarding the evidence. Because the prosecutor's actions endangered the integrity of the judicial process, the conviction was reversed and the cause remanded for a new trial.

People v. Santiago, 384 Ill.App.3d 784, 895 N.E.2d 989 (1st Dist. 2008) Under Supreme Court Rule of Professional Conduct 4.2, a lawyer shall not communicate with a party whom the lawyer "knows to be represented by another lawyer in the matter," unless the other lawyer consents or the questioning is otherwise authorized by law. The Appellate Court concluded that Rule 4.2 applies to both civil and criminal proceedings, and that prosecutors must contact defense counsel when questioning a defendant concerning a matter on which the accused is known to have retained counsel.

People v. Thomas, 116 Ill.App.3d 216, 452 N.E.2d 77 (1st Dist. 1983) General allegations in a post-trial motion (such as that the prosecutor's closing argument was "prejudicial, inflammatory, and erroneous," without setting out the specific remarks complained of) is insufficient to preserve the issue for appeal. See also, **People v. Cunningham**, 177 Ill.App.3d 544, 532 N.E.2d 511 (1st Dist. 1988); **People v. Young**, 133 Ill.App.3d 886, 479 N.E.2d 494 (2d Dist. 1985); **People v. McCue**, 175 Ill.App.3d 762, 530 N.E.2d 271 (3d Dist. 1988).

People v. Estes, 127 Ill.App.3d 642, 469 N.E.2d 275 (3d Dist. 1984) The defendant was charged with and convicted of voluntary manslaughter. During closing argument the prosecutor said, "I want you to keep in mind . . . that [defendant] is not charged with murder." The Court held this observation was irrelevant and suggested to the jury that the defendant had already been given a "break" by being charged with voluntary manslaughter.

People v. Ammons, 251 Ill.App.3d 345, 622 N.E.2d 58 (3d Dist. 1993) Playing an 18-minute tape of defendant's statement was analogous to reading from a transcript during closing arguments, and was improper because it "dramatically overemphasized" defendant's statement. The error was not harmless where the tape was the primary evidence showing defendant's intent to kill. But see, **People v. Gross**, 265 Ill.App.3d 74, 637 N.E.2d 789 (2d Dist. 1994) (no error occurred where only limited, inconsistent excerpts of defendant's tape-recorded statement were played during closing arguments).

People v. Thomas, 146 Ill.App.3d 1087, 497 N.E.2d 803 (5th Dist. 1986) Defendant's charges arose out of an incident in which he allegedly grabbed a woman (Ms. Brown, with whom he had previously lived) and pulled her down the street to his house where he allegedly struck her. At trial, Ms. Brown testified that her prior statement, which claimed that defendant had pulled her down the street and struck her, was false. She claimed that she had made the statement because she was mad at the defendant. Another witness, Ms. Wyatt, testified that she saw defendant dragging Brown down the street and that Brown was hollering and trying to get away. During closing argument, the prosecutor stated that Ms. Brown's story was "trumped up" and that Ms. Wyatt was afraid of defendant and his family. The prosecutor further stated there was nobody in court from the Wyatt family and "there's nobody here for the People, just you." The Court held that the prosecutor's comment was plain error since it "misstated the function of the jury in our adversarial system and diminished the presumption of innocence."

People v. Frazier, 107 Ill.App.3d 1096, 438 N.E.2d 623 (1st Dist. 1982) It was an improper

"appeal to the fears of the jury" for the prosecutor to state: "If you have sisters, wives, daughters, you know at some point in their life — they are going to be sitting next to somebody and you don't want them raped by that person." See also, **People v. Gutierrez**, 205 Ill.App.3d 231, 564 N.E.2d 850 (1st Dist. 1990).

People v. Seymoure, 158 Ill.App.3d 1038, 511 N.E.2d 986 (4th Dist. 1987). At a DUI trial, it was improper for the prosecutor to ask the jurors whether they wanted their son or daughter to meet defendant on the highway, and to comment that it was too bad drunk drivers in other cases had not been arrested before they injured or killed someone. This argument was "an improper appeal to passion and suggested future criminal conduct."

People v. Johnson, 149 Ill.App.3d 465, 500 N.E.2d 728 (3d Dist. 1989) It was improper for the prosecutor to align himself with the jury by saying it is "our job to find the facts." See also, **People v. Thomas**, 149 Ill.App.3d 1087, 497 N.E.2d 803 (5th Dist. 1986) (improper to tell jury that "there's nobody here for the People, just you") **People v. Vasquez**, 8 Ill.App.3d 679, 291 N.E.2d 5 (1st Dist. 1972) (prosecutor erred by telling jury he was the 13th juror.)

People v. Fletcher, 156 Ill.App.3d 405, 509 N.E.2d 625 (1st Dist. 1987) The following comments by the prosecutor were "inflammatory and represented his own opinions." (1) that the jury could find defendant "not guilty and declare open season for child molesters," (2) that acquitting defendant would mean that "a seven year old's testimony can never convict a defendant," and (3) that a not guilty verdict would "encourage sex offenders to abuse families."

People v. Dace, 237 Ill.App.3d 476, 604 N.E.2d 1013 (5th Dist. 1992) The prosecutor argued repeatedly that the jury could acquit only if it could tell each State's witness that he or she was mistaken. The Court found such argument improper because an acquittal could have been based solely on the jury's disbelief of the victim, who was the only occurrence witness. See also, **People v. Davidson,** 235 Ill.App.3d 605, 601 N.E.2d 1146 (1st Dist. 1992) (prosecutor erroneously told the jury that it could acquit only if it disbelieved all the State's witnesses).

People v. Slaughter, 84 Ill.App.3d 88, 404 N.E.2d 1058 (3d Dist. 1980) It was improper for the prosecutor to say that "if you don't come back with a verdict of guilty in this case, there will be no way that another jury hearing a case like this could find a guy guilty." Compare, **People v. Jones**, 108 Ill.App.3d 880, 439 N.E.2d 1011 (4th Dist. 1982) (proper for prosecutor to argue that if residents of the county were to be safe the case required verdicts of guilty).

People v. Threadgill, 166 Ill.App.3d 643, 520 N.E.2d 86 (2d Dist. 1988) It was improper for the prosecutor to repeatedly state that the jurors' decision would indicate whether they supported the police officers who were protecting them. This argument "diverted the jurors from the evidence by turning the trial into a test of the jurors' support for local police officers."

People v. Lee, 242 Ill.App.3d 40, 610 N.E.2d 727 (4th Dist. 1993) Although the error was harmless the trial court should not have allowed the prosecutor to point a shotgun at the jury during closing arguments. The court stated " Jurors should not be forced to endure such conduct. Jury duty is often demanding, but jurors do not consent to be abused by counsel when they take their oaths. The prosecutor's insensitive assault on these jurors, who had no avenue of escape, defense, or even complaint, warrants the most severe criticism."

People v. Wolf, 178 Ill.App.3d 1064, 534 N.E.2d 204 (3d Dist. 1989) At defendant's trial for residential burglary, a witness testified the entry was made by throwing a brick or rock through a window. Police officers did not find any brick or rock at the crime scene. During closing argument, the prosecutor placed a brick on counsel table. The trial judge ordered the brick removed and admonished the jury that the brick had nothing to do with the case and was to be disregarded. The Court held that the prejudicial effect of the prosecutor's conduct was not cured by the trial court's instructions to the jury and that the error was not harmless beyond a reasonable doubt.

People v. Quiver, 205 Ill.App.3d 1067, 563 N.E.2d 991 (1st Dist. 1990) In reviewing the alleged improper comments of a prosecutor the reviewing court "may consider their cumulative effect rather than assess the prejudicial effect of each isolated comment.

People v. Harris, 228 Ill.App.3d 204, 592 N.E.2d 533 (1st Dist. 1992) The Court reversed where the prosecutor asserted in argument that defendant had "dragged" her daughter into court and asked her to commit perjury. The trial court's attempts to cure the prejudice by sustaining an objection and instructing the jury to disregard were not sufficient, in part because the accusation was made during rebuttal argument and the defense had no opportunity to respond.

People v. Howard, 232 Ill.App.3d 386, 597 N.E.2d 703 (1st Dist. 1992) In closing argument of a homicide case, the prosecutor erred by arguing that an involuntary manslaughter verdict would be a "cop-out" and that defendant should be convicted of murder.

People v. Stack, 244 Ill.App.3d 166, 613 N.E.2d 1175 (1st Dist. 1993) During rebuttal closing argument, the prosecutor repeatedly argued that defendant would be released and "free to kill again" if acquitted by reason of insanity. The trial court sustained several objections and instructed the jury to disregard the comments. The Appellate Court reversed finding that the State improperly commented on the consequences of an insanity acquittal. Prosecutors are prohibited from stating, implicitly or explicitly, that an insanity acquittal may result in release of the defendant either automatically or at the discretion of State authorities. The Court also concluded that the prosecutor erred by referring to the Psychiatric Institute as the "armpit" of the court system, by asking the defense expert whether "temporary insanity" is a defense in Illinois, and by repeatedly emphasizing that the offense occurred on Mother's Day.

People v. Armstrong, 275 Ill.App.3d 503, 655 N.E.2d 1203 (4th Dist. 1995) It is not error for the prosecutor to argue that a criminal defendant has a motive to lie merely because he is the defendant. Since the trier of fact may consider a defendant's "bias or prejudice" in determining credibility, argument calling such matters to the attention of the trier of fact is proper.

People v. Fomond, 273 Ill.App.3d 1053, 652 N.E.2d 1322 (1st Dist. 1995) The prosecutor erred in argument by revealing the substance of evidence to which an objection had been sustained, and by arguing that the defendant's objection had prevented the jury from hearing the evidence. Although the Court concluded that the error was harmless, it added " we wish to express our disapproval of 'prosecutorial brinkmanship'. The State's actions in this case were in disregard of its duty to provide the defendant with a fair trial."

People v. Anderson, 407 Ill.App.3d 662, 944 N.E.2d 359 (1st Dist. 2011)

In closing argument, defense counsel stated that when a police officer testified at trial, she "could not afford" to contradict her pretrial testimony concerning defendant's statement. Counsel also stated that it was "convenient" that police failed to videotape defendant's statement. In rebuttal, the prosecutor argued that detectives would not have ignored defendant's request for insulin, as defendant claimed, because of potential liability had defendant passed out or died for lack of medication.

On appeal, the State argued that the prosecutor's response was invited by defense counsel's argument. The Appellate Court held that defense counsel's argument was based on the evidence and was a legitimate criticism of the police officer's credibility. Thus, the "invited response" doctrine, which permits a party to respond to improper argument by its opponent, did not apply.

However, because there was overwhelming evidence of defendant's guilt, the prosecutor's remark did not constitute plain error under the first prong of the plain error rule.

(Defendant was represented by Assistant Defender Bryon Reina, Chicago.)

People v. Donahue, 2014 IL App (1st) 120163 (No. 1-12-0163, 6/27/14)

In rebuttal closing argument, the prosecutor stated that the defense theory of the case was that the charges were the result of a "police conspiracy." Defense counsel objected, and the objection was overruled.

The prosecutor then discussed television shows about conspiracy theories concerning the assassinations of John F. Kennedy, Martin Luther King, and Robert Kennedy. The prosecutor stated that although such shows identify motives on the part of the alleged conspirators, the defense had failed to provide any motive for the police to enter a conspiracy to frame the defendant.

The prosecutor then implied that the jury would be "letting down" members of the military who were serving overseas if it acquitted defendant and that the victim would have been safer serving overseas in the military than being on the streets of Chicago. The prosecutor also discussed the battles of Iwo Jima, Fallujah, and Khe Sanh before stating that the death rate is lower in the military than in Chicago.

The court concluded that the prosecutor's remarks were improper but did not constitute reversible error.

1. The Illinois Supreme Court has issued conflicting case law concerning the standard of review for improper closing arguments by the prosecution. In **People v. Blue**, 189 Ill. 2d 99, 724 N.E.2d 920 (2000), the court applied an abuse of discretion standard of review. By contrast, in **People v. Wheeler**, 226 Ill. 2d 92, 871 N.E.2d 728 (2007), the Supreme Court used a *de novo* standard of review.

The court found that it need not decide which standard of review applied because in this case the result would be the same under either standard.

2. The court concluded that defendant waived any objection to remarks that a war zone would be safer than Chicago and that an acquittal would damage the interests of overseas troops. The court also concluded that those remarks did not constitute plain error under the "closely balanced evidence" prong of the plain error rule.

Closing arguments will lead to reversal only if the prosecutor's remarks cause "substantial prejudice." Substantial prejudice occurs where the improper remarks are a

material factor in defendant's conviction.

Here, the prosecutor's remarks were clearly improper. The court concluded, however, that due to their bizarre nature they did not cause substantial prejudice. The court noted that the remarks were completely unrelated to the only issue at trial, which was the identity of the shooter. Because the remarks were "so completely unrelated [to the issues] it is unlikely that they tipped the scales of justice at trial."

3. Similarly, the prosecutor's remark that defendant was claiming a police conspiracy and references to political assassinations were improper but did not create reversible error. Because defendant preserved objections to those remarks, the State had the burden of proving they were harmless beyond a reasonable doubt.

The court concluded that the prosecutor's remarks were improper because arguing that defendant had failed to prove a motive for a police conspiracy erroneously shifted the burden of proof to the defense. However, the court found that the remarks were harmless beyond a reasonable doubt because the "completely outlandish nature" of "ramblings about conspiracy theories, assassinations of political figures and the landing on the moon bordered on the bizarre" and caused little prejudice to defendant.

Defendant's conviction for first degree murder was affirmed.

(Defendant was represented by Assistant Defender Deepa Punjabi, Chicago.)

People v. Marshall, 2013 IL App (5th) 110430 (No. 5-11-0430, 9/13/13)

Courts have consistently condemned the introduction of race into a prosecutor's arguments. A prosecutor also may not argue facts that are not based on evidence in the record or align himself with the jury, effectively making himself a thirteenth juror.

The Appellate Court found plain error where a consistent theme of the prosecutor's argument in both opening and closing statements to the jury was the "culture of the black community," where people were raised to believe that the police and prosecutors are the enemy and the biggest sin that you could commit was to be a snitch. These arguments arbitrarily injected race into the jury's deliberations and had no bearing on the credibility of the State's witnesses. The comments were "naked prejudice" with no basis in the evidence. By contrasting the "black community" with "our white world," the prosecutor also improperly aligned himself with the jury.

People v. Mpulamasaka, 2016 IL App (2d) 130703 (No. 2-13-0703, 2/17/16)

The court found that the prosecutors committed error in several respects during closing argument, and that it was "reasonably certain that but for the errors . . . the jury's verdict would have been not guilty."

1. The prosecutors erred where they used evidence that had been introduced on a count for which a directed verdict had been granted to establish an element of another count. Although the trial court neglected to tell the jury that a directed verdict had been ordered on the count to which the evidence was relevant, and defense counsel failed to request such an instruction, that oversight "did not give the State license" to use the evidence to confuse the jury concerning the remaining charges.

2. Where defendant was charged with aggravated criminal sexual assault, the prosecutors erred by referring to him in closing argument as a "predator" who took "a piece of meat" home. "Each of these remarks was clearly improper and an attempt to cultivate anger toward defendant."

3. The prosecutors erred in closing argument by making statements which attacked the integrity and denigrated the testimony of a defense expert. Although the State did not

challenge the expert's qualifications, it argued that he "was at the rent-a-doctor agency sipping a latte" and sold his integrity "for three pieces of silver." At the same time, the State misstated the expert's testimony.

The court noted that the trial court overruled defense objections to the argument, giving the jury the impression that the statements accurately described the expert's opinion. Furthermore, some of the improper remarks were made in the State's rebuttal, when the defense had no chance to respond.

4. The prosecutors erred by arguing that the complainant's testimony on cross-examination, which supported defendant's claim of consent, was the result of misleading and confusing questioning by defense counsel. There was no evidence that the complainant had any trouble understanding defense counsel's questions, and urging the jury to ignore the testimony on cross-examination because it was "not [the complainant's] words" violated the right to confront witnesses and the right to a fair trial.

5. The prosecutor engaged in misconduct by sitting at the witness stand in closing argument while arguing about the complainant's "courage in testifying" and commenting on defendant's credibility (despite the fact that defendant did not testify). "Whether intentionally or not, by arguing S.B.'s courage and then transitioning to defendant's credibility, the prosecutor might have reminded the jury that defendant did not testify, especially when the argument was made from the witness chair."

Furthermore, the tactic of "leaving the podium and sitting in the witness chair . . . was designed to evoke sympathy for [the complainant] and disgust for defendant." In rejecting the State's argument that defendant cited no authority that a party cannot sit in the witness chair during closing argument, the court stated: "There does not need to be a case precedent to establish that certain conduct is improper. Many practices and customs have been historically followed in the trial process."

The court concluded that even in the absence of a defense objection, the trial court should have prevented the prosecutor from arguing from the witness stand.

6. Finally, the prosecution erred by ending its rebuttal with a "final appeal to sympathy" by calling defendant a "bully" who took advantage of the "weakest among us." "[G]uilty verdicts may not be based on sympathy."

(Defendant was represented by former Assistant Defender Barb Paschen, Elgin.)

People v. Ringland, Pirro, Saxen, Harris and Flynn, 2015 IL App 130523 (Nos. 3-13-0523, 3-13-0823, 3-13-0848, 3-13-0926, & 3-13-0927, 6/3/15)

Section 3–9005(b) of the Counties Code provides that a State's Attorney may appoint one or more special investigators to "serve subpoenas, make return of process and conduct investigations which assist the States's Attorney in the performance of his duties." 55 ILCS 5/3-9005(b). Section 3-9005(b) also provides that such investigators "shall be peace officers" with powers authorized for investigators of the State's Attorneys Appellate Prosecutor. Investigators for the States Attorneys Appellate Prosecutor are peace officers and "have the powers possessed by policemen in cities and by sheriffs," but may "exercise such powers only after contact and cooperation with the appropriate law enforcement agencies." 725 ILCS 210/7.06(a).

The State's Attorney of LaSalle County appointed and equipped special investigators to staff the State's Attorney's Felony Enforcement unit. The purpose of the SAFE unit was to patrol highways which pass through the county, with the intent to enforce drug laws. The SAFE unit investigators were not sworn officers in LaSalle County, but were officers who had retired from various police departments.

A SAFE unit special investigator stopped defendant Ringland on Interstate 80 for driving with "inadequate mud flaps" and because the vehicle's rear license plate was obscured. A canine team was called, and cannabis was found when the car was searched after the canine alerted. The standard practice of the SAFE unit was to call for a canine unit whenever a traffic stop was made.

The other four defendants were stopped by the same investigator while traveling on I-80 on separate days. Each was charged with a drug offense after being stopped for a traffic violation.

The court concluded that the State's Attorney exceeded the scope of §3-9005(b) by creating the SAFE unit staffed by State's Attorney investigators. The court found that the plain language of §3-9005(b) limits the functions of special investigators to serving subpoenas, making return of process, and conducting investigations that assist the State's Attorney in the performance of his or her duties. The court concluded that if the LaSalle County's State's Attorney's actions were permissible, these statutory limitations on the powers of special investigators would be superfluous because there would be no distinction between sworn police officers and special investigators of the State's Attorney's office.

The court added that the intent of §3-9005(b) is not to allow the State's Attorney to create his or her own police force, but to provide State's Attorney's investigators with police powers to the extent necessary to assist the State's Attorney in cases originated by traditional police agencies or where the police are unable or unwilling to investigate. Here, there was no evidence that the prosecutions were originated by traditional police agencies or that police were unable or unwilling to investigate the defendants' activities. Because the actions of the SAFE investigator exceeded statutory authority, the trial acted properly by granting the defendants' motions to suppress.

People v. Schaffer, 2014 IL App (1st) 113493 (No. 1-11-3493, 1/17/14)

It is improper for a prosecutor to ask the defendant's opinion on the veracity of other witnesses, because such questions demean and ridicule the defendant and intrude on the jury's function to determine witness credibility. While the practice may be harmless error when the evidence of guilt is overwhelming, reversal is warranted where the evidence is closely balanced and witness credibility is a crucial factor in the jury's determination of guilt or innocence.

The prosecutor acted improperly in cross-examining the defendant by asking whether the complainant had made up several allegations, whether evidence that there was a cut in a screen door made it seem that defendant was guilty, whether a detective lied about defendant's statements at the police station, and whether a police officer was lying. The court rejected the argument that such questioning was designed to give defendant an opportunity to explain differences in the evidence, noting that the prosecutor did not ask for an explanation of such differences and instead asked whether the complainant and two officers had fabricated their testimony.

The court noted that the evidence was closely balanced and that both the complainant and defendant had problems with their credibility. Furthermore, the trial court did not cure the prejudice, although it sustained four defense objections to the improper questioning, where the prosecutor made additional improper inquiries after the defense objections were sustained.

Defendant's convictions for aggravated criminal sexual assault, home invasion, and armed robbery were reversed and the cause remanded for a new trial.

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§41-2
Comments in Opening Statements

People v. Whitlow, 89 Ill.2d 322, 433 N.E.2d 629 (1982) At defendant's trial for securities law violations, the prosecutor said that investors had been told part of their money would be used to build condominiums. Although 17 investors testified, none testified about any condominium project. Thus, the prosecutor's comment was not based upon the evidence. Also in his opening statement, the prosecutor stated that the investors were not told about a certain bill incurred by the seller's company. However, the evidence showed that bill had not been incurred until after the stock was sold. Thus, the prosecutor's allegation was improper, since the defendants could not have informed purchasers about a bill not yet incurred.

People v. Johnson, 218 Ill.2d 125, 842 N.E.2d 714 (2005) Although a DUI suspect's refusal to take a blood alcohol test may be admitted to show consciousness of guilt, the prosecutor erred by arguing, in both opening and closing arguments, that defendant's refusal to take the test was a failure to take advantage of an opportunity to "prove" that he was not guilty of DUI. The court concluded that such arguments conflict with the presumption of innocence and "should not be countenanced." However, the court concluded that the argument did not constitute plain error. The court found that the prosecutor did not rely on defendant's refusal to take the test to prove the State's case, the arresting officer testified concerning defendant's physical actions (which caused him to believe that defendant was under the influence of alcohol), and defendant admitted that he had two drinks shortly before his arrest and that his recollection of the incident might have been impaired. In addition, the improper comments were brief and not emphasized, and the prosecutor explained the State's burden of proof to the jury and painstakingly reviewed all of the evidence. Under these circumstances, "defendant has failed to persuade us that the verdict would not have been the same had the improper remarks been omitted."

People v. Richmond, 341 Ill.App.3d 39, 791 N.E.2d 1132 (1st Dist. 2003) The Appellate Court held that the State erred by presenting its opening statement as if the prosecutor was the eight-year-old complainant. A "first-person" opening statement may not be error under certain circumstances, but was improper here because it bolstered the credibility of the State's principal witness by delivering her "version of the facts much more eloquently than [she] did from the witness stand." In addition, the prosecutor erred by continuing to use the complainant's perspective when "discussing evidence that, according to trial testimony, R.J. was never exposed to" (i.e., defendant's confession). Although the opening statement was not plain error (because the evidence was not closely balanced), "the State assumes a risk of reversal when it makes a first-person opening statement like the one in this case."

People v. Bunning, 298 Ill.App.3d 725, 700 N.E.2d 716 (4th Dist. 1998) The prosecutor erred by failing to present witnesses after asserting in opening statements that they would be called. Because the prosecutor claimed that the witnesses would corroborate the testimony of a State witness, failing to call them allowed the jury to learn of "facts" about which no evidence was presented.

People v. Weinger, 101 Ill.App.3d 857, 428 N.E.2d 924 (1st Dist. 1981) In his opening statement, the prosecutor said that an eyewitness would testify that defendant was wearing

a turquoise necklace at the crime scene and that such a necklace was recovered from defendant's apartment. Although such a necklace was recovered from defendant's apartment, the eyewitness did not testify that such a necklace was worn by the defendant. Consequently, the prosecutor's argument created the erroneous impression that defendant's identification was independently corroborated.

People v. Roberts, 100 Ill.App.3d 469, 426 N.E.2d 1104 (1st Dist. 1981) The defendant was charged with official misconduct. During opening statements the prosecutor stated that defendant had been thrown out of office, held a tax referendum for an illegal purpose, and hired people to remove park district records to conceal his misconduct. At trial no evidence was introduced to establish those alleged facts. The Court held that the statements were improper and reversed. The State's opening statement: "is an outline of facts which the prosecutor in good faith expects to prove and it is improper, with foreknowledge, to include matters in an opening statement which are not thereafter proved. . . . We believe that the prosecution was aware at the time of its opening statement that it lacked sufficient proof to sustain these allegations."

People v. Huddleston, 176 Ill.App.3d 18, 530 N.E.2d 1015 (1st Dist. 1988) Counsel may, in closing argument, comment upon opposing counsel's failure to produce evidence promised in opening statement.

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People v. Jones, 2016 IL App (1st) 141008 (No. 1-14-1008, 10/11/16)

While the State has wide latitude in opening statements and is entitled to comment on the evidence, it is improper to use derogatory and pejorative terms to describe the defendant which only arouse the prejudice and passions of the jury. Improper comments require reversal only if they engender substantial prejudice and it is impossible to say whether or not a guilty verdict resulted from them.

Here the State characterized defendant as a criminal four times in opening statements. The State continued to call defendant a criminal even after defendant objected and the court told the jury to disregard the State's comments.

The Appellate Court held that the State's comments were improper. The State characterized defendant as a criminal facing off against police officers. These comments "conjured a powerful image calculated to invoke an emotional response," and had no place in any opening statements. Additionally, the comments had no basis in fact since defendant had never been convicted of a crime. The State's only purpose was to inflame the passions of the jury.

The court found these statements to be reversible error. The State's evidence was not overwhelming and thus the court could not say that the comments did not contribute to defendant's conviction. Defendant's conviction was reversed and remanded for a new trial.

(Defendant was represented by Assistant Defender Chris Bendik, Chicago.)

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§41-3

Misstatements of the Law

People v. Weinstein, 35 Ill.2d 467, 220 N.E.2d 432 (1966) The prosecutor misstated the law by repeatedly stating that defendant had the burden of introducing evidence to create a reasonable doubt. See also, **People v. Giangrande**, 101 Ill.App.3d 397, 428 N.E.2d 503 (1st Dist. 1981) ("where's the evidence that the defendant didn't do it"); **People v. Harbold**, 124 Ill.App.3d 363, 464 N.E.2d 734 (1st Dist. 1984) (prosecutor argued that there was no evidence showing that defendant was not guilty); **People v. Tyson**, 137 Ill.App.3d 912, 485 N.E.2d 523 (2d Dist. 1985) (prosecutor improperly implied that defendant had to provide a theory of innocence or present evidence to support his innocence).

People v. Phillips, 127 Ill.2d 499, 538 N.E.2d 500 (1989) After reviewing the defendant's theory of defense, the prosecutor stated: "if they had a good defense couldn't they come up with something better than that" and "if they had anything better they would have put it on." The Court held that the above remarks were permissible comments on the evidence and were not an attempt to shift the burden of proof. "This Court has never implied that once a defendant presents evidence it is beyond the reach of appropriate comment by the prosecution. There is a great deal of difference between an allegation by the prosecution that defendant did not prove himself innocent and statements questioning the credibility of a defendant's case.

People v. Keene, 169 Ill.2d 1, 660 N.E.2d 901 (1995) The prosecution erred by describing the presumption of innocence as a "cloak of innocence" that had been "shredded and ripped and pulled" off to reveal defendant's guilt. Because the defendant "enjoyed the benefit of the presumption until the point during deliberation when the jury concluded that there existed proof of guilt beyond a reasonable doubt," the prosecutor's remarks were erroneous.

People v. Bryant, 94 Ill.2d 514, 447 N.E.2d 301 (1983) The prosecutor's characterization of the State's burden of proof as one "which is not unreasonable and met each and every day in courts" was *not* improper — it did not reduce the State's burden. See also, **People v. Phillips**, 127 Ill.2d 499, 538 N.E.2d 500 (1989) (reasonable doubt "not proof beyond all doubt, it is not proof beyond any doubt, it is proof beyond a reasonable doubt"); **People v. Gacho**, 122 Ill.2d 221, 522 N.E.2d 1146 (1988); Compare, **People v. Starks**, 116 Ill.App.3d 384, 451 N.E.2d 1298 (1st Dist. 1983) (finding that prosecutor's remarks reduced the State's burden to a *pro forma* or minor detail).

People v. Adams, 109 Ill.2d 102, 485 N.E.2d 339 (1985) The prosecutor did not misstate the reasonable doubt standard by telling the jury that "you are not required to search out a series of potential explanations compatible with innocence and elevate them to the status of reasonable doubt" or by asking "would you make a decision based on the facts in this cause that you are confident of?" The Court held that the prosecutor was "arguing the weight of the evidence."

People v. Johnson, 146 Ill.2d 109, 585 N.E.2d 78 (1991) In response to defendant's insanity defense, the prosecutor argued that "[T]o the defendant, insanity is like a train. . . He catches that train whenever he needs it. [I]n 1978 he got on. . . Now he gets in trouble again in 1985 [and] here comes the insanity express . So this is where [defendant gets] on. He is riding the train now. And if you sign a verdict that he is insane the train pulls into the next station. And you know who gets off." The Court found that the prosecutor's comments did not imply that

defendant had been acquitted on insanity grounds in 1978 (an assertion on which there was no evidence), but that the "train analogy served to illustrate the prosecutor's contention that defendant could feign insanity when it was necessary and cease feigning when it became unnecessary." The Court concluded that such an argument was "fairly inferable" from expert testimony that defendant had attempted to fake a mental disease. Defendant also contended that the prosecutor misstated the law by telling the jury that defendant would "get off" if he was found insane, because the argument implied that he would be automatically freed if found not guilty by reason of insanity. The Court disagreed; the phrase "get off" referred to defendant's "avoiding criminal responsibility for the crimes" and was an accurate statement of the law.

People v. Kuntu, 196 Ill.2d 105, 752 N.E.2d 380 (2001) The prosecutor committed plain error at the death hearing by describing a statutory mitigating factor - absence of a prior record - as an aggravating factor. Because the legislature has determined that the absence of a prior criminal record is a statutory mitigating factor, the prosecutor erred by "change[ing] the legislative scheme and convert[ing] a fact that the legislature has determined to weigh in favor of not sentencing the defendant to death to a fact that weighs in favor of sentencing a defendant to death." The State is free to dispute the defense's characterization of nonstatutory mitigating factors, but may not urge the jury to employ a statutory mitigating factor "in a manner directly opposite to the way in which the legislature intended."

People v. Fluker, 318 Ill.App.3d 193, 742 N.E.2d 799 (1st Dist. 2000) The prosecutor erred by arguing that no witnesses had testified that defendant did not commit the shooting. This remark shifted the burden of proof to the defense, and created "the impression that defendant should have produced a witness to say he was not the shooter."

People v. Edgecombe, 317 Ill.App.3d 615, 739 N.E.2d 914 (1st Dist. 2000) Arguments that defense counsel failed to ask the complainant certain questions about defendant's actions represented an attempt to shift the burden of proof to the defense. Such remarks, "although not designed to direct the attention of the jury to the defendant's failure to testify, were designed to direct the attention of the jury to questions defense counsel should have asked, which improperly shifted the burden of proof."

People v. Castaneda, 299 Ill.App.3d 779, 701 N.E.2d 1190 (4th Dist. 1998) Defendant was denied a fair trial by the prosecutor's closing argument, which suggested that the jurors' oaths required them to convict. A prosecutor errs by arguing that jury members either have a duty to convict or will violate their oaths if they fail to do so. The error was not harmless - the evidence of defendant's involvement in the offense was "equivocal," and the prosecutor's improper argument "might well have tipped the scales in the State's favor." See also, **People v. Peete**, 318 Ill.App.3d 961, 743 N.E.2d 689 (4th Dist. 2001) (prosecutor erred by arguing that the jury's "job" was to convict).

People v. Young, 323 Ill.App.3d 1078, 753 N.E.2d 1046 (1st Dist. 2001) The Court reversed after finding that the prosecutor erred by: (1) asking the defendant to comment on the veracity of State's witnesses, (2) misstating the jury's responsibilities and the State's burden of proof, (3) cross-examining the defendant regarding his post-arrest silence, prior bad acts and other crimes, (4) vouching for certain witnesses, and (5) interjecting personal opinions regarding the evidence.

People v. Sutton, 316 Ill.App.3d 874, 739 N.E.2d 543 (1st Dist. 2000) Where the jury was instructed on self-defense and first and second degree murder, the prosecutor erred in closing argument by stating that it was time for justice for the decedent and that any verdict other than first degree murder "lets [defendant] walk away from this." Such argument not only introduced sentencing issues but also misstated the law; due to his prior convictions, had defendant been convicted of second degree murder a prison term of between four and 20 years would have been required. The argument was not harmless error because it occurred at the end of the rebuttal argument when defense counsel had no opportunity to respond other than by objecting.

People v. Miller, 302 Ill.App.3d 487, 706 N.E.2d 947 (1st Dist. 1998) The prosecutor committed plain error in closing argument by asserting that in order to find that defendant had not committed the murder, the jury would have to believe that the State's witnesses "all got together" and were "lying" to convict defendant "and let the real killer go free." Under **People v. Coleman**, 158 Ill.2d 319, 633 N.E.2d 654 (1994), there is a distinction between arguing that: (1) to *acquit* the defendant the jury must believe that the State's witnesses are lying, and (2) to *believe* defendant's version of the incident, the jury must believe that the State's witnesses are lying. The former is a misstatement of law and a "serious error which shifts the burden of proof," while the latter is usually a misstatement of the evidence and a less serious error. Here, the argument was a misstatement of law that distorted the burden of proof. The argument was especially prejudicial because under the circumstances of the case, an acquittal could have been based on a belief that the State's witnesses were mistaken.

People v. McCoy, 378 Ill.App.3d 954, 881 N.E.2d 621 (3d Dist. 2008) The court reversed the conviction and remanded for a new trial based upon the prosecutor's misstatement of the law defining the offense. The court found that the prosecutor misstated the law in two ways. First, he argued that the subject of an arrest "does not have a right to argue with a peace officer," and "implied that mere argument is sufficient for a finding of guilty." In addition, he stated that the offense of resisting a peace officer was complete when defendant remained on her cell phone (in an attempt to call 911) instead of immediately complying with the officer's command to drop the phone. Although "such conduct may arise to the level of resisting if a person persists in refusing to comply . . ., there is nothing in the law to suggest that a person may not at least question the validity of the officer's actions." The erroneous remarks constituted plain error, because the evidence was so closely balanced that the error threatened to tip the scales of justice.

People v. Burke, 136 Ill.App.3d 593, 483 N.E.2d 674 (4th Dist. 1985) It was a misstatement of the law for the prosecutor to say: "Now in this case the defendant, as every other defendant is presumed to be not guilty until we say different."

People v. Adams, 281 Ill.2d 339, 666 N.E.2d 769 (1st Dist. 1996) The prosecutor improperly shifted the burden of proof to the defense where he argued that the jury should not "give the defendant the benefit of a doubt in this case."

People v. Gutierrez, 205 Ill.App.3d 231, 564 N.E.2d 850 (1st Dist. 1990) It was improper for the prosecutor to equate "recklessness" with "accident." These legal concepts are not synonymous — "[r]ecklessness requires a conscious awareness of a substantial risk of harm and a disregard of that risk [but] an accident may result from negligence."

People v. Wilson, 120 Ill.App.3d 950, 458 N.E.2d 1081 (1st Dist. 1983) The prosecutor misstated the law by telling the jury that if defendant was found not guilty by reason of insanity he would be automatically released. It was also a misstatement of the law for the prosecutor to say that an insanity defense is not proper in a rape case. See also, **People v. Stack**, 244 Ill.App.3d 166, 613 N.E.2d 1175 (1st Dist. 1993) (during rebuttal closing argument the prosecutor erroneously argued that defendant would be released and "free to kill again" if acquitted by reason of insanity; prosecutors are prohibited from stating that an insanity acquittal may result in release of the defendant either automatically or at the discretion of State authorities).

People v. Duckworth, 98 Ill.App.3d 1034, 424 N.E.2d 1337 (4th Dist. 1981) Prosecutor misstated the law by telling the jury that to be insane the defendant must not know that his conduct was wrong. The correct standard is that the defendant lacks "substantial capacity" to know his conduct was wrong.

People v. Estes, 127 Ill.App.3d 642, 469 N.E.2d 275 (3d Dist. 1984) The prosecutor misstated the law of self-defense by arguing that there is a duty to retreat and by saying that the deceased's prior threats to defendant and infliction of injuries "did not count"; evidence of the deceased's violent disposition and threats were relevant. Finally, a suggestion that finding defendant had acted in self-defense would be the equivalent of morally condoning the act was "clearly prejudicial and outside the bounds of fair comment."

People v. Keefe, 209 Ill.App.3d 744, 567 N.E.2d 1052 (1st Dist. 1991) In a case involving self-defense, the prosecutor erred by arguing that defendant was not justified in using force unless he feared for his life. The argument was a clear misstatement of the law, as defendant was entitled to use deadly force if he either reasonably feared for his life or reasonably believed that he was in imminent danger of great bodily harm.

People v. Crum, 183 Ill.App.3d 473, 539 N.E.2d 196 (1st Dist. 1989) It was improper for the prosecutor to argue that accident and self-defense are mutually exclusive affirmative defenses — it is not contradictory for a defendant to present evidence and argument concerning both.

People v. Cole, 80 Ill.App.3d 1105, 400 N.E.2d 93 (3d Dist. 1980) The prosecutor misstated the law by telling the jury that to believe the defense witnesses it must find that each State witness was lying. See also, **People v. Rogers**, 172 Ill.App.3d 471, 526 N.E.2d 655 (2d Dist. 1988).

People v. Burnside, 212 Ill.App.3d 605, 571 N.E.2d 487 (3d Dist. 1991) In a prosecution for unlawful use of weapons by a felon, the prosecutor argued that one result of being a convicted felon is that " the law says you can't have guns in your house. That's the law. And if you have got them in your house, it's against the law." The Court held that the prosecutor misstated the law by suggesting defendant could be found guilty even if he did not knowingly possess the weapons. The improper comments were reversible error because defendant claimed that he shared a bedroom with his brother and that he had never seen the guns before.

People v. Clarke, 245 Ill.App.3d 99, 612 N.E.2d 1351 (2d Dist. 1993) Defendant was convicted of aggravated battery. Defendant contended that the victim (McBain) had been the aggressor. At trial, Billy Hopper testified that on another occasion, McBain used his car to

repeatedly bump Hopper's car while Hopper was waiting in a drive-through line at a restaurant. In addition, the defense called a deputy to testify about McBain's violent behavior after his arrest. During closing argument, the prosecutor twice said that to consider the incident at the restaurant would be "dragging Larry McBain through the mud." Defense counsel objected, and the trial judge stated that the jury would be instructed on the proper use of the evidence. The prosecution again said that the defense was trying to "drag McBain through the mud with that garbage," and this time a defense objection was overruled. The Court held that because McBain's prior violence was relevant in determining which party was the aggressor, the prosecutor's argument misstated the law. Because the trial court failed to sustain the objection to the reference to the defense theory as "garbage," the jury might have rejected properly-admitted evidence. Thus, the Court found that the cumulative effect of the improper arguments denied defendant a fair trial.

People v. Yonker, 256 Ill.App.3d 795, 628 N.E.2d 1124 (1st Dist. 1993) The prosecutor argued that the jury must convict if it did "not believe the defendant." As a matter of plain error the Court found that the prosecutor's argument improperly shifted the burden of proof to the defense. The State is required to prove each element of the crime, without regard to whether the jury believes the defendant's testimony. The defendant is entitled to acquittal if the State fails to meet its burden, even if the jury disbelieves the defense evidence. Even brief comments shifting the burden of proof compromise "the fairness of the judicial process and will not be tolerated."

People v. Buckley, 282 Ill.App.3d 81, 668 N.E.2d 1082 (3d Dist. 1996) The prosecutor committed plain error by making repeated statements equating "recklessness," the relevant state of mind here, with "carelessness."

People v. Davis, 287 Ill.App.3d 46, 677 N.E.2d 1340 (1st Dist. 1997) The prosecutor misstated the law by implying that an expert cannot be cross-examined with another expert's diagnosis.

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People v. Glasper, 234 Ill.2d 173, 917 N.E.2d 401 (2009)

The court rejected defendant's argument that plain error occurred where the prosecutor made several allegedly improper remarks. The court found that the majority of the remarks were either invited by the defense or proper under the evidence. However, the prosecutor erred by stating to the jury that the job of the foreperson was to "keep everybody on track" and prevent consideration of any "wild unsubstantiated theory" that was not supported by the evidence.

The court concluded that the prosecutor's statement "amounted" to an instruction to the foreperson to forbid discussion of the defense theory that defendant had been coerced into confessing. However, the court found that the improper remarks were harmless because they would not have overcome the effect of the trial court's proper jury instructions.

In addition, the prosecutor erred by comparing the conditions of defendant's police interrogation with jury service, and asking whether any of the jurors were "ready to confess to a murder you didn't commit?" Although the remark was irrelevant and had no purpose other than to distract the jurors from the case, it was not so prejudicial as to cause the jury

to ignore the trial court's instructions. (See also **JURY**, §32-4(a)).

Defendant's conviction for first degree murder and attempted first degree murder was affirmed, as were the consecutive sentences of 80 and 30 years.

(Defendant was represented by Assistant Defender Elizabeth Botti, Chicago.)

People v. Carbajal, 2013 IL App (2d) 111018 (No. 2-11-1018, 3/7/13)

1. The State is given wide latitude in closing argument but is not allowed to misstate the law or the facts of the case.

Defendant's theory of defense to the charge of burglary was that he had no intent to commit a theft at the time he entered the building and had no knowledge of his companion's intent to commit a theft at the time of entry. Therefore, he was guilty of no more than criminal trespass. The prosecutor misstated the law by advising the jury that this defense, even if believed, would not absolve the defendant of responsibility for the burglary.

2. It is impermissible for the prosecution to attempt to shift the burden of proof to the defense.

The prosecutor shifted the burden of proof to the defense by telling the jury on two occasions that defendant had failed to prove his innocence. The prosecutor told the jury that defendant self-serving testimony "does not prove the defendant's innocence in any way." Commenting on the absence of an exculpatory explanation of defendant's conduct from his written statement, the prosecutor stated, "That right there proves your innocence, and he didn't put that in his statement." These statements gave the jury the impression that defendant was under an obligation to prove his innocence.

(Defendant was represented by Assistant Defender Sherry Silvern, Elgin.)

People v. Donahue, 2014 IL App (1st) 120163 (No. 1-12-0163, 6/27/14)

In rebuttal closing argument, the prosecutor stated that the defense theory of the case was that the charges were the result of a "police conspiracy." Defense counsel objected, and the objection was overruled.

The prosecutor then discussed television shows about conspiracy theories concerning the assassinations of John F. Kennedy, Martin Luther King, and Robert Kennedy. The prosecutor stated that although such shows identify motives on the part of the alleged conspirators, the defense had failed to provide any motive for the police to enter a conspiracy to frame the defendant.

The prosecutor then implied that the jury would be "letting down" members of the military who were serving overseas if it acquitted defendant and that the victim would have been safer serving overseas in the military than being on the streets of Chicago. The prosecutor also discussed the battles of Iwo Jima, Fallujah, and Khe Sanh before stating that the death rate is lower in the military than in Chicago.

The court concluded that the prosecutor's remarks were improper but did not constitute reversible error.

1. The Illinois Supreme Court has issued conflicting case law concerning the standard of review for improper closing arguments by the prosecution. In **People v. Blue**, 189 Ill. 2d 99, 724 N.E.2d 920 (2000), the court applied an abuse of discretion standard of review. By contrast, in **People v. Wheeler**, 226 Ill. 2d 92, 871 N.E.2d 728 (2007), the Supreme Court used a *de novo* standard of review.

The court found that it need not decide which standard of review applied because in this case the result would be the same under either standard.

2. The court concluded that defendant waived any objection to remarks that a war zone

would be safer than Chicago and that an acquittal would damage the interests of overseas troops. The court also concluded that those remarks did not constitute plain error under the "closely balanced evidence" prong of the plain error rule.

Closing arguments will lead to reversal only if the prosecutor's remarks cause "substantial prejudice." Substantial prejudice occurs where the improper remarks are a material factor in defendant's conviction.

Here, the prosecutor's remarks were clearly improper. The court concluded, however, that due to their bizarre nature they did not cause substantial prejudice. The court noted that the remarks were completely unrelated to the only issue at trial, which was the identity of the shooter. Because the remarks were "so completely unrelated [to the issues] it is unlikely that they tipped the scales of justice at trial."

3. Similarly, the prosecutor's remark that defendant was claiming a police conspiracy and references to political assassinations were improper but did not create reversible error. Because defendant preserved objections to those remarks, the State had the burden of proving they were harmless beyond a reasonable doubt.

The court concluded that the prosecutor's remarks were improper because arguing that defendant had failed to prove a motive for a police conspiracy erroneously shifted the burden of proof to the defense. However, the court found that the remarks were harmless beyond a reasonable doubt because the "completely outlandish nature" of "ramblings about conspiracy theories, assassinations of political figures and the landing on the moon bordered on the bizarre" and caused little prejudice to defendant.

Defendant's conviction for first degree murder was affirmed.

(Defendant was represented by Assistant Defender Deepa Punjabi, Chicago.)

People v. Euell, 2012 IL App (2d) 101130 (No. 2-10-1130, 5/16/12)

It is improper for a prosecutor to make comments that shift the burden of proof to defendant or shift the burden to the defendant to elicit exculpatory evidence.

The prosecutor's argument shifted the burden of proof to defendant by commenting not just that there was no evidence supporting the defense theory, but there was "no evidence of that from the defense standpoint." This statement was not an argument that the defense theory was not a reasonable inference from the evidence, but told the jury not to give credence to the defense theory because defendant had not presented any evidence in support of that theory.

The State effectively shifted the burden to the defendant to elicit exculpatory evidence when it commented on the questions defense counsel should have but did not ask the prosecution's primary witness.

The court affirmed defendant's conviction because the comments were not plain error.

(Defendant was represented by Assistant Defender Christopher McCoy, Elgin.)

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§41-4
Misstatements of the Evidence

People v. Halteman, 10 Ill.2d 74, 139 N.E.2d 286 (1956) The prosecutor may make a closing argument which is based upon the evidence or on legitimate inferences deducible therefrom, but it is improper to misstate the evidence or argue alleged facts which are not in evidence.

See also, **People v. Albanese**, 104 Ill.2d 504, 473 N.E.2d 1246 (1984); **People v. Cloutier**, 178 Ill.2d 141, 687 N.E.2d 930 (1997) (prosecutor erroneously argued that defendant had gotten "all kinds of breaks" when he was "paroled"); **People v. Williams**, 161 Ill.2d 1, 641 N.E.2d 296 (1994) (error to argue at death hearing that defendant should have gotten murder sentence for prior manslaughter conviction; prosecutor had agreed to earlier plea bargain); **People v. Woolley**, 178 Ill. 2d 175, 687 N.E.2d 979 (1997)(error to argue that prior misdemeanor convictions could have been charged as felonies).

People v. Weaver, 92 Ill.2d 545, 442 N.E.2d 255 (1982) It is improper for the prosecutor to argue as substantive evidence testimony that was introduced for the limited purpose of impeachment. See also, **People v. Bradford**, 106 Ill.2d 492, 478 N.E.2d 1341 (1985); **People v. Kelly**, 134 Ill.App.3d 732, 480 N.E.2d 1343 (1st Dist. 1985).

People v. Whitlow, 89 Ill.2d 322, 433 N.E.2d 629 (1982) At a trial for securities law violations, the prosecutor's statement (that certain rent money was "going in [defendant's] pocket") was "totally unsupported by any evidence from which the inference could be derived."

People v. Linscott, 142 Ill.2d 22, 566 N.E.2d 1355 (1991) Where the expert testimony was that defendant's hair was "consistent" with hair found at the crime scene and that there was "no dissimilarity," the prosecutor erred by arguing that defendant's hair had been found at the scene. The prosecutor compounded the error by arguing that there was only a slight mathematical probability that the hair found at the scene came from someone other than defendant. The prosecutor stated that the matching of head hairs from two separate individuals only occurs "in one out of every forty five hundred times." These comments were without foundation and "were patently inapplicable to the results of the tests performed on the hairs in this case." It was also improper for the prosecutor to say in closing argument that defendant's hair "matched" the hair at the crime scene. The experts refused to use the word "match" and testified only that the hair was "consistent." Also, blood-typing tests of the victim and defendant revealed that the victim was a type O secretor and defendant was a type AB nonsecretor. An examination of the victim revealed the presence of seminal material and type O blood. Based upon the evidence, the proper conclusion was that the victim had sexual intercourse prior to her death with either a person who was a secretor and had type O blood or a nonsecretor (i.e., such as defendant). However, in closing statements, the prosecutor "repeatedly" stated that the seminal material came from a nonsecretor. The Court found that such argument was plain error because it misrepresented the blood-typing evidence and ignored the possibility that the seminal material could have come from a secretor with type O blood. See also, **People v. Tillman,** 226 Ill.App.3d 1, 589 N.E. 2d 587 (1st Dist. 1991) (the prosecutor committed plain error by arguing that defendant's pubic hair was found at the crime scene where the expert testified only that the hair was similar to that of defendant.)

People v. Redd, 173 Ill.2d 1, 670 N.E.2d 583 (1996) The prosecutor erred during closing argument by describing defendant's statement as a "confession"; the statement did not in any way acknowledge having committed the offenses.

People v. Abadia & Arias, 328 Ill.App.3d 669, 767 N.E.2d 341 (1st Dist. 2001) Allegations that the defense had intimidated witnesses to prevent them from testifying were improper where the record contained no supporting evidence. The court reached the issues on the behalf of both defendants, although objections to some arguments were raised at trial only by counsel

for one defendant. "While . . . the waiver argument is a work horse of the State's Attorney's office and often is dispositive, waiver cannot be ubiquitously applied where the record does not support such a finding." See also, **People v. Armstead**, 322 Ill.App.3d 1, 748 N.E.2d 691 (1st Dist. 2001) (trial court erroneously overruled defense objections to argument that witnesses were afraid to testify because defendant had threatened them where there was no evidence to support that allegation); **People v. Slabaugh**, 323 Ill.App.3d 723, 753 N.E.2d 1170 (2d Dist. 2001) (error to claim that witnesses conspired to commit perjury where there was no evidence that the witnesses had discussed their testimony.)

People v. Roman, 323 Ill.App.3d 988, 753 N.E.2d 1074 (1st Dist. 2001) The prosecutor erred by arguing that defendant lacked respect for police authority and by comparing defendant to the individuals who carried out the attack at Columbine High School. It was also error to refer to "selling drugs" because no evidence concerning drugs or the sale of drugs was admitted at trial.

People v. Shief, 312 Ill.App.3d 673, 728 N.E.2d 638 (1st Dist. 2000) The prosecutor committed reversible error in closing argument by buttressing an identification witness's testimony with the assertion that the prosecutor would recognize a nurse who had attended his child during a serious illness, even though he could not have described her. The record was devoid of any evidence concerning the incident with the nurse, and the anecdote "served only to bolster the credibility of the victim and her testimony" by suggesting that she "shared the same ability as the prosecutor to identify an individual regardless of the circumstances under which the identification occurred."

People v. Terry, 312 Ill.App.3d 984, 728 N.E.2d 669 (1st Dist. 2000) The Court found that the prosecution made allegations for which there was no evidentiary support. First, the State erroneously asserted that the defendant belonged to a gang that was selling drugs; the only eyewitness who testified did not give any reason for the offense, there was no evidence that gang slogans were shouted or gang signs flashed, and there was no testimony that a gang-related incident precipitated the offense. Second, the State erred by asserting that defendant and his friends were present to sell drugs, that one of the witnesses had not come forward because she lived in a "drug infested neighborhood" and was not "going to stand up to the likes of this drug dealer . . . [a]nd his gang of buddies," and that defendant and his friends were "out there protecting their turf." The evidence showed that drug dealing had frequently occurred in the area, but not that defendant and his group were selling drugs. The State also erred in closing argument by asserting that the defendant had threatened witnesses. Although there was evidence that a witness had received threats related to the case, there was no evidence that defendant was involved. The errors required reversal of defendant's convictions.

People v. Carter, 297 Ill.App.3d 1028, 697 N.E.2d 895 (1st Dist. 1998) It is improper to make statements which serve no purpose except to inflame the jury. Where there was no evidence that defendant possessed drugs in the vicinity of children, sold drugs to children, or was a member of a band of drug dealers "plying their trade in the neighborhood," the prosecutor's remarks to that effect were intended merely to inflame the jury's passions.

People v. Rogers, 172 Ill.App.3d 471, 526 N.E.2d 655 (2d Dist. 1988) It was improper for the prosecutor to refer to defendant's prior convictions, which had been introduced as impeachment, "as substantive proof that defendant was familiar with the legal system and .

. . was lying and trying to get out the easiest way he can."

People v. Clark, 186 Ill.App.3d 109, 542 N.E.2d 138 (1st Dist. 1989) At a trial for unlawful use of weapons by a felon, it was stipulated that defendant had a prior conviction for armed robbery. The prosecutor made repeated comments about the prior conviction in closing argument, including pointing out that armed robbery is similar to unlawful use of a weapon. Defendant argued that the prosecutor's repeated emphasis of the armed robbery conviction was error because of the increased likelihood the jury would convict based on defendant's alleged propensity to commit the crime. The Court agreed; though a prosecutor may comment on facts in evidence, repeated references to the prior armed robbery conviction made it more likely that the jury would find that defendant knowingly carried the gun on the day of his arrest based on his possession of a gun on a prior occasion.

People v. Nightengale, 168 Ill.App.3d 968, 523 N.E.2d 136 (1st Dist. 1988) It was improper for the prosecutor to argue that defendant's fingerprints were found at the crime scene where there was no such evidence.

People v. Eddington, 129 Ill.App.3d 745, 473 N.E.2d 103 (4th Dist. 1984) The prosecutor's comment (that a State witness, an alleged co-conspirator, never said that defendant was not involved in the offense) was improper; the witness had testified that he made such a statement.

People v. Johnson, 149 Ill.App.3d 465, 500 N.E.2d 728 (3d Dist. 1986) The prosecutor erred by asserting that the evidence showed without contradiction that the defendant shot the victim; there was evidence that defendant had denied the shooting.

People v. Nino, 279 Ill.App.3d 1027, 665 N.E.2d 847 (3d Dist. 1996) The prosecutor erred by arguing that a prosecution was possible only because a member of defendant's gang broke a "gang creed" by talking to police. The prosecutor's arguments were improper references to defendant's post-arrest silence and his right not to testify at trial, and "improperly highlighted the fact that [another gang member] chose to testify *and* the defendant did not." In addition, the prosecutor erred during closing argument by repeatedly arguing that gang members who had testified for the State would be unable to live in Joliet because there would be a "death warrant" against them. There was no evidence in the record to support this argument.

People v. Rivera, 277 Ill.App.3d 811, 661 N.E.2d 429 (1st Dist. 1996) The prosecutor erred by arguing that a State's witness "is taking a lot of chances" by testifying, because "he took his life in his own hands" and would be "sign[ing] his own death warrant" if he testified falsely against a gang member. The argument was improper because the record disclosed no evidence that the witness feared retaliation from anyone. To the contrary, the witness testified that he did not fear for his life at the time of the shooting and that he was used to shootings because they happen "every day." Holding that it knew "of no separate jurisprudence for cases of gang-related violence," the Court stated that the State's argument " played to popular fears about gang violence and did not have a shred of support in the record."

People v. Rodriguez, 134 Ill.App.3d 582, 480 N.E.2d 1147 (1st Dist. 1985) The prosecutor's comment about "protection" for a State witness was " inflammatory and not based on evidence."

People v. Daniels, 172 Ill.App.3d 616, 527 N.E.2d 59 (2d Dist. 1988) It was improper for the prosecutor to comment that the sexual assault victims "are not normal children anymore, it is going to take a long time, a lot of therapy to make them normal because of the things [defendant] did." The testimony could not support the prosecutor's "far-reaching statement."

People v. White, 192 Ill.App.3d 55, 548 N.E.2d 421 (1st Dist. 1989) The prosecutor stated that if the victims had awakened while defendant was burglarizing their home defendant might have been charged with rape or murder. Also, the prosecutor remarked that the defendant could have had a gun. The comments were improper since they were not based upon the evidence.

People v. Rogers, 172 Ill.App.3d 471, 526 N.E.2d 655 (2d Dist. 1988) The prosecutor improperly stated that officers could not have known a certain fact about the crime unless it was told to them by the defendant because the officers had no contact with the witnesses before they interviewed the defendant. The evidence did not show that the officers had no contact with the witnesses prior to the interview with defendant.

People v. Aguirre, 291 Ill.App.3d 1028, 684 N.E.2d 1372 (2d Dist. 1997) The prosecutor committed reversible error by asserting that a backseat passenger was "willing to take the fall" despite allegedly not knowing the defendant very well.

People v. Hayes, 183 Ill.App.3d 752, 539 N.E.2d 355 (1st Dist. 1989) During closing argument, the prosecutor related a personal incident which was factually similar to the complainant's testimony. The comments were improper because they went far beyond the evidence and "strongly implied that the victim's testimony should be believed." See also, **People v. Bratton**, 178 Ill.App.3d 718, 533 N.E.2d 572 (4th Dist. 1989).

People v. Dace, 237 Ill.App.3d 476, 604 N.E.2d 1013 (5th Dist. 1992) During closing argument the prosecutor repeatedly stated that the jury could vote to acquit only if it could tell each State's witness that he or she was mistaken. The Court found such argument improper because an acquittal could have been based solely on the jury's disbelief of the victim, who was the only occurrence witness. See also, **People v. Davidson,** 235 Ill.App.3d 605, 601 N.E.2d 1146 (1st Dist. 1992) (prosecutor erroneously told the jury that it could acquit defendant only if it disbelieved all the State's witnesses.)

People v. Davidson, 235 Ill.App.3d 605, 601 N.E.2d 1146 (1st Dist. 1992) Defendant's convictions were reversed because of the cumulative effect of several errors. The errors included cross-examination insinuating, without any support in the record, that defendant was using cocaine and heroin at the time of the incident (the Court rejected the State's argument that this insinuation worked to defendant's advantage because it made him appear more "mellow" and less likely to engage in a fight), accusing defendant of omitting from his direct examination testimony any claim that the complainant had been armed when in fact defendant had made such a claim, and misstating defendant's confession to make it appear that he had admitted being angry and wanting revenge against the complainant.

People v. Jackson, 2012 IL App (1st) 102035 (No. 1-10-2035, 7/10/12)

A prosecutor has great latitude in closing argument and may argue fair and reasonable inferences drawn from the evidence at trial. He may not argue facts not based on the evidence in the record. A prosecutorial misstatement of fact results in reversal of a conviction and remand for a new trial if the remarks substantially prejudiced the defendant and were a material factor in his conviction.

Defendant was charged with aggravated unlawful use of a weapon when the police recovered a gun from his car. Defendant denied knowledge of the gun and testified that other people had been in the car that day. A passenger was also in the car when it was stopped. In closing argument, the prosecutor misstated the evidence when he remarked that defendant told the officers he found a gun in his car.

The determinative issue at defendant's trial was his knowledge that a gun was in his car when he was pulled over by the police. The jury's judgment rested solely on the credibility of witnesses at trial. Defendant had no opportunity to respond to the prosecutor's misstatement because it was made during rebuttal. Given the closeness of the evidence and the fact that the erroneous argument spoke directly to the issue of defendant's knowledge of the gun, the error substantially prejudiced defendant and was a material factor in his conviction.

The Appellate Court reversed and remanded for a new trial.

(Defendant was represented by Assistant Defender Kieran Wiberg, Chicago.)

People v. Marshall, 2013 IL App (5th) 110430 (No. 5-11-0430, 9/13/13)

Courts have consistently condemned the introduction of race into a prosecutor's arguments. A prosecutor also may not argue facts that are not based on evidence in the record or align himself with the jury, effectively making himself a thirteenth juror.

The Appellate Court found plain error where a consistent theme of the prosecutor's argument in both opening and closing statements to the jury was the "culture of the black community," where people were raised to believe that the police and prosecutors are the enemy and the biggest sin that you could commit was to be a snitch. These arguments arbitrarily injected race into the jury's deliberations and had no bearing on the credibility of the State's witnesses. The comments were "naked prejudice" with no basis in the evidence. By contrasting the "black community" with "our white world," the prosecutor also improperly aligned himself with the jury.

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§41-5
Comments About the Possible Sentences

People v. Sutton, 316 Ill.App.3d 874, 739 N.E.2d 543 (1st Dist. 2000) At a murder trial the jury was instructed on self-defense and first and second degree murder. During closing argument defense counsel asked the jury to convict of second degree murder, and the prosecutor responded that it was time for justice for the decedent and that any verdict other than first degree murder "lets [defendant] walk away from this." This argument was improper both because it introduced sentencing issues and also because it misstated the law. Due to

defendant's prior record, a prison term of between four and 20 years would have been required for a second degree murder conviction. The argument was prejudicial because the comment occurred at the end of the rebuttal argument when defense counsel had no opportunity to respond other than by objecting.

People v. Arroyo, 328 Ill.App.3d 861, 769 N.E.2d 503 (2d Dist. 2002) Defendant was denied a fair trial for murder where the prosecutor stated during opening statements that an eyewitness who was expected to testify for the defense had been the getaway driver in the offense and was serving a 20-year sentence. Not only did the remarks suggest the potential sentence defendant would face if convicted, but it was "presumptuous to mention an impeaching conviction in the opening statement when there had not been a determination by the trial court . . . that the probative value of the conviction was not substantially outweighed by the danger of unfair prejudice."

People v. Chapin, 84 Ill.App.3d 778, 406 N.E.2d 579 (3d Dist. 1980) The prosecutor acted improperly by commenting about the possibility of probation.

People v. Crossno, 93 Ill.App.3d 808, 417 N.E.2d 827 (3d Dist. 1981) At defendant's trial for murder, at which the jury was instructed on involuntary manslaughter, it was improper for the prosecutor to say that "if you want to slap him on the wrist find him guilty of involuntary manslaughter." The Court stated "it is elemental that counsel may not inform the jury of the severity of the sentence. The prosecutor's reference to the severity of the sentence for involuntary manslaughter was not merely informing the jury, but was misinforming it."

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§41-6
Comments About Excluded Evidence, Evidence Not Offered and Rulings of the Judge

People v. Emerson, 97 Ill.2d 487, 455 N.E.2d 41 (1983) An officer testified that when defendant was arrested he did not resist, but went peaceably. In closing argument, defense counsel stated that when defendant was arrested he did not act like a guilty person. In response the prosecutor said: "We can't tell you everything he did after his arrest and he knows it. Maybe when this is over I will tell you what he did when he was arrested." The prosecutor's comment was "clearly improper" — "it is error to comment on facts which are inadmissible or to suggest the evidence of guilt existed which, because of defendant's objection, cannot be brought before the jury."

People v. Whitlow, 89 Ill.2d 322, 433 N.E.2d 629 (1982) Where the trial judge had ruled that the State could not inquire into defendant's past criminal activity, it was improper for the prosecutor to comment that "maybe this time he will get caught." The comment suggested that defendant had previously engaged in illegal conduct.

People v. Mullen, 141 Ill.2d 394, 566 N.E.2d 222 (1990) At the defendant's jury trial for murder, in which the victim had been shot in the back, one of the State's principal witnesses initially refused to testify. Outside the jury's presence he said his reluctance was due to fear of "some boys around the house." After a recess, the witness agreed to testify. The trial judge

admonished counsel not to make any reference to the witness's reluctance to testify. During closing argument, the prosecutor commented upon the witness's reluctance to testify and that this was for the "same reason no one wanted to talk, at first . . . they do not want one of these [bullets] in their back." The Supreme Court held that the comments were plain and reversible error. The trial judge had specifically excluded evidence of the witness's motive for initially refusing to testify, and there was no evidence to support the prosecutor's argument.

People v. Collins, 351 Ill.App.3d 175, 813 N.E.2d 285 (2d Dist. 2004) Evidence of gang membership is admissible if it is related in some way to the crime charged. The court concluded that the prosecutor's "description of defendant as wearing beads and a blue bandana appears to us to be an attempt to imply that defendant was involved in a gang," in a case in which such evidence was irrelevant.

People v. Eghan, 344 Ill.App.3d 301, 799 N.E.2d 1026 (2d Dist. 2003) The trial court abused its discretion by allowing the State to elicit testimony that officers were acquainted with the defendant before the crime. Although the trial judge granted defendant's motion *in limine* on this point, the State argued during opening and closing statements that officers identified defendant and called him by name at the scene, and elicited testimony from police officers that they were familiar with the defendant. Such evidence and argument violated the *in limine* order and was "highly prejudicial."Defendant was also prejudiced by the State's closing argument that defendant had stood behind the truck on which the controlled substance was found and made "some sort of movement with his feet that[was] indicative of someone reaching into a pocket and getting something out." Because the trial court sustained a defense objection to testimony that defendant's posture resembled that of someone who was trying to get something out of his pocket, the prosecutor's reference concerned testimony that the trial court had ruled inadmissible.

People v. Lowry, 354 Ill.App.3d 760, 821 N.E.2d 649 (1st Dist. 2004) The State's Attorney engaged in improper argument by referring in closing argument to "studies" on eyewitness identification, where no evidence on such studies had been admitted. In addition, the prosecutor erred by arguing that an Assistant State's Attorney and a police officer would not risk their careers by lying under oath, where the defense had not challenged the credibility of the officer or the prosecutor.

People v. Porter, 372 Ill.App.3d 973, 866 N.E.2d 1249 (3d Dist. 2007) As a matter of plain error, the Appellate Court found that the prosecutor's closing argument required a new trial. Although prosecutors have wide latitude to argue fair and reasonable inferences from the evidence, they also have an ethical obligation to refrain from presenting improper and prejudicial evidence or argument. The prosecutor may not argue assumptions or facts not based on the evidence in the record, and may not present argument calculated solely to inflame the passions and prejudices of the jury. Here, there was no evidence to support the prosecutor's argument that defendant was "selling drugs in a neighborhood where he didn't belong." Although there was evidence that someone in a group was yelling at passing cars, there was no evidence that defendant was part of the group. Thus, there was no basis for an argument that defendant was "flagging down cars" and asking motorists if they wanted to buy drugs. "[T]he prosecution improperly went outside the record and argued evidence that was not elicited before the jury."

People v. Shief, 312 Ill.App.3d 673, 728 N.E.2d 638 (1st Dist. 2000) The prosecutor committed reversible error in closing argument by responding to defense counsel's discussion of discrepancies in the police reports by stating the reports were not evidence but "if I had my way, I would hand you all these police reports and say you go back in there and say he's guilty[.]" The comments about the police reports were erroneous because they suggested that the defense had intentionally prevented the jury from seeing evidence that would have unequivocally established defendant's guilt. The court also noted that the reports had been admitted only for impeachment purposes and would not have been admissible as substantive evidence.

People v. Barraza, 303 Ill.App.3d 794, 708 N.E.2d 1256 (2d Dist. 1999) The prosecutor erred by referring to a conversation not in evidence to vouch for the complainants' credibility. "[B]y telling a personal story about a conversation with his daughter," the prosecutor relied on facts not in evidence to imply "that any child might be reluctant to discuss sexual abuse." Because the evidence of guilt consisted almost entirely of the complainants' uncorroborated testimony, the error was not harmless.

People v. Shelton, 303 Ill.App.3d 915, 708 N.E.2d 815 (5th Dist. 1999) At a trial for driving under the influence of drugs, the prosecutor erred by arguing that codeine and Darvon "can affect [one's] ability to drive a vehicle safely." The Court stated, "Clearly, no evidence as to the effect of any drug was presented at trial." The prosecutor also erred by asking the jurors to consider any experience they might have had in taking codeine or Darvon to determine whether defendant's "actions were consistent with those drugs." The court concluded, "This request for the jurors to use their own, everyday experience to determine an issue that is clearly the province of expert testimony is reversible error."

People v. Wetzell, 308 Ill.App.3d 886, 721 N.E.2d 643 (1st Dist. 1999) While attempting to explain shell casings found at the scene which could not have been fired by the defendant or the co-defendant, the prosecutor argued that if the jury took a field trip to the crime scene, "I bet we would recover a whole lot of discharged casings . . .[but] [t]hat has nothing to do with the case you are deciding today." The Court held that this argument was improper because it argued facts not in evidence.

People v. Beasley, 384 Ill.App.3d 1039, 893 N.E.2d 1032 (4th Dist. 2008) The prosecutor erred during closing argument by shifting the burden of proof to the defense. After the defense argued that the State had not submitted several items for fingerprint analysis, the prosecutor responded that the defense could have sent evidence to the lab for examination, but did not. After an objection was overruled, the prosecutor stated that if it was "unconscionable" for the State not to have tested the evidence, "it's just as unconscionable on the part of the defense." The defense is under no obligation to present evidence. It is error for the prosecutor to imply that the defendant must produce evidence to create a reasonable doubt of guilt. The court rejected the State's argument that the defendant opened the door by stating it was unconscionable for the State not to have tested items for fingerprints. "[W]hile defendant may have invited the State to explain why it chose not to submit certain items for fingerprinting, a defendant . . . can never 'open the door' to shift the burden of proof. In addition, because the defendant has no burden to submit evidence for analysis, the failure to do so cannot be considered 'unconscionable.' "

People v. Wilson, 123 Ill.App.3d 798, 463 N.E.2d 890 (1st Dist. 1984) It is improper for the prosecutor to comment that certain evidence was not introduced because the defense objected. See also, **People v. Ray**, 126 Ill.App.3d 656, 467 N.E.2d 1078 (1st Dist. 1984). Compare, **People v. Cooper**, 136 Ill.App.3d 517, 483 N.E.2d 309 (1st Dist. 1985) (prosecutor's comment about excluded evidence was proper as a response to defense counsel's argument).

People v. Barnes, 107 Ill.App.3d 262, 437 N.E.2d 848 (1st Dist. 1982) At trial, the defense prevented a police officer from testifying about blood stains found at the crime scene 13 days after the incident. After defense counsel commented in closing argument on the lack of any evidence from the apartment, the prosecutor stated: "Counsel knows all the evidence in the apartment. He knows what we had. We wish we could show it to you." This comment was improper because it suggested that evidence linking defendant to the crime was being withheld from the jury.

People v. Weinger, 101 Ill.App.3d 857, 428 N.E.2d 924 (1st Dist. 1981) In his rebuttal argument, the prosecutor stated that defense counsel said much "about what the eyewitnesses testified to, but very little is said about what they were not allowed to testify to." This comment was error - "remarks that the jury was not allowed to hear certain evidence because of defendant's objections [is] improper and have been repeatedly held to be reversible error."

People v. Kelly, 134 Ill.App.3d 732, 480 N.E.2d 1343 (1st Dist. 1985) It was improper for the prosecutor to argue that the trial judge would not have permitted evidence about a witness's identification of defendant if that identification was unreliable.

People v. Hanna, 185 Ill.App.3d 1069, 542 N.E.2d 131 (1st Dist. 1989) The State sought to introduce two statements made by the shooting victim to a police officer at the scene (the victim was deceased at the time of trial). The trial judge ruled that the officer could not testify as to the contents of the statements, finding they were neither dying declarations or spontaneous declarations. The judge did allow the officer to testify that the victim said something to her. During rebuttal, the prosecutor referred to the officer's testimony and said, " I leave it to the 12 of you. I think you know what [the victim] said ." The Court held that the remarks went beyond the scope of proper comment and invited the jury to determine the content of the statements. "What the State was precluded from presenting directly through [the officer's] testimony at trial, it sought to accomplish indirectly through suggestion during rebuttal argument."

People v. Harbold, 220 Ill.App.3d 611, 581 N.E.2d 132 (1st Dist. 1991) At defendant's trial for murder, the trial court excluded all motive testimony. During rebuttal closing argument, the prosecutor made reference to a possible motive by referring to various interests shared by the defendant and the victim's wife. The Court held that the prosecutor's comments regarding a possible motive were improper since they were not based upon the evidence and "were a back door attempt to present the jury with a motive when evidence of motive was specifically excluded from trial." The Court held that the comments were not proper rebuttal to defense counsel's argument that there was a friendly relationship between defendant and the victim and that the State had not presented evidence of a reason why defendant would kill the victim. The Court stated that the "proper response would have been to reiterate to the jury that the State was not required to prove motive," but not to go "a step further and [offer] a motive for

the jury."

People v. Fomond, 273 Ill.App.3d 1053, 652 N.E.2d 1322 (1st Dist. 1995) The prosecutor erred in closing argument by revealing the substance of evidence to which an objection had been sustained, and by arguing that the defendant's objection had prevented the jury from hearing the evidence. Although the Court concluded that the error was harmless, it added: "[W]e wish to express our disapproval of what one court has described as "prosecutorial brinkmanship" The State's actions in this case were in disregard of its duty to provide the defendant with a fair trial, and the repeated attempts to introduce a statement that was clearly hearsay jeopardized the conviction in an otherwise strong case against the defendant.

Cumulative Digest Case Summaries **§41-6**

People v. Adams, 403 Ill.App.3d 995, 934 N.E.2d 1073 (3d Dist. 2010)

The prosecutor committed reversible error when he argued that due to their profession, police officers were more credible witnesses than the defendant. The prosecutor also erred by attempting to boost the credibility of a police officer based on evidence that had not been introduced.

1. Illinois courts are divided on whether it is permissible for a prosecutor to argue credibility based on the status of a police officer and the possible repercussions of testifying falsely. Cases permitting such argument generally hold that the statements are proper comments based on the evidence or on inferences drawn from the evidence. By contrast, cases disallowing such statements generally hold that a police officer is not more credible solely because of his or her profession.

In this case, the court concluded that such statements are improper because they attempt to bolster a witness's credibility solely due to his or her status. "[A] person is not more credible merely because he or she chooses the profession of a police officer."

Thus, the prosecutor erred by arguing that two officers were credible because one was an eight-and-one-half-year veteran of the police department and the other had been an officer for five years. Similarly, the prosecutor erred by arguing that the officers would not risk their jobs, freedom and reputations by lying under oath.

Although defense counsel failed to object, the court concluded that plain error occurred because the evidence was closely balanced and the verdict depended on whether the jury believed the officers' testimony or that of the defendant. Because the verdict could have been affected by the improper argument, a new trial was required.

2. The prosecutor also committed plain error by arguing that the officer who claimed to have found the cocaine in defendant's pocket "locked himself in to his version of events" by preparing a police report shortly after the incident, while defendant "had almost two and a half years to come up with the story he told you today." Arguments must be based on the evidence, and there was no evidence that the officer had prepared a report after the offense or what such a report contained.

The conviction was reversed and the cause remanded for a new trial.

(Defendant was represented by Assistant Deputy Defender Verlin Meinz, Ottawa.)

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§41-7
Continuing With Arguments or Questions After Objection is Sustained

People v. Weinger, 101 Ill.App.3d 857, 428 N.E.2d 924 (1st Dist. 1981) The prosecutor persisted in asking questions after the court had sustained defense objections. The Court described this conduct as "reprehensible" and rejected the State's argument that the prosecutor's actions were proper because the trial judge's rulings were erroneous.

People v. Larry, 218 Ill.App.3d 658, 578 N.E.2d 1069 (1st Dist. 1991) Though the trial court repeatedly sustained hearsay objections to certain questions, the prosecutor continued to ask similar questions throughout direct and cross-examination. The Court held that the prosecutor's conduct was "egregious" when he informed the jury that a witness who had not testified denied owning the gun in question. By asking the same question after objections had been sustained, and by discussing the subject in closing argument, the prosecutor defeated the salutary effect of the trial court's rulings. "In fact, the prosecutor's repetition of objectionable questions served to increase the prejudice to [defendant] by suggesting . . . that defense counsel was attempting to prevent [the jury] from hearing pertinent evidence."

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§41-8
Voicing Opinion

People v. Black, 317 Ill. 603, 148 N.E. 281 (1925) The prosecutor may argue his belief that the evidence warrants a conviction, and may tell the jury that the State witnesses spoke the truth and are more credible than those for the defense. However, it is improper for the prosecutor to express his own individual opinion or belief of defendant's guilt.

People v. Tiller, 94 Ill.2d 303, 447 N.E.2d 174 (1982) The prosecutor stated that "man has elevated himself to a plateau above animals because man . . . has eliminated survival of the fittest, but animals must kill to survive," and that criminals "are lower than animals because they kill without reason." The prosecutor also characterized the murders in this case as a "holocaust, similar to the Nazi holocaust." The Court held that the above comments were improper since they served "no purpose except to inflame the jury."

People v. Caballero, 126 Ill.2d 248, 533 N.E.2d 1089 (1989) It was improper for the prosecutor to state "I didn't go to law school to put innocent men in the penitentiary" and "this man is guilty." These comments were erroneous because they "tended to put the prosecutor's own credibility into issue." A prosecutor "may not give his own opinion as to the guilt or innocence of the accused unless it is apparent that the opinion is solely based on the evidence."

People v. Wilson, 199 Ill.App.3d 792, 557 N.E.2d 571 (1st Dist. 1990) In closing argument, the prosecutor stated that it was not his job to convict innocent people. He emphasized, "[I]t is my duty and obligation if I become aware that someone's not guilty, to dismiss the case." The Court held that the prosecutor's comments were plain error. It is improper for a prosecutor to express personal beliefs or invoke the integrity of his office in support of a conviction.

People v. Slaughter, 84 Ill.App.3d 88, 404 N.E.2d 1058 (3d Dist. 1980) It was improper for the prosecutor to say that "if you don't come back with a verdict of guilty in this case, there will be no way that another jury hearing a case like this could find a guy guilty."

People v. Ray, 126 Ill.App.3d 656, 467 N.E.2d 1078 (1st Dist. 1984) The prosecutor erred by suggesting that "witnesses were afraid to testify because defendant had threatened or intimidated them." Where such comments are not "based upon any evidence in the record . . . [they] are highly prejudicial and inflammatory."

People v. Estes, 127 Ill.App.3d 642, 469 N.E.2d 279 (3d Dist. 1984) The "suggestion to the jury that a finding that the defendant had acted legally in self-defense was equivalent to morally condoning the act" was prejudicial and "outside of the bounds of fair comment." The only effect of this argument was to arouse the "prejudice and passion of the jury against the defendant."

People v. Turner, 127 Ill.App.3d 784, 469 N.E.2d 368 (1st Dist. 1984) The prosecutor's statement in closing argument (that he did not charge people with crimes "until we have the evidence") was improper. "A prosecutor's statements implying that charges would not have been placed against the defendant unless the prosecutor thought he was guilty are improper. See also, **People v. Janes**, 138 Ill.App.3d 558, 486 N.E.2d 317 (2d Dist. 1985).

People v. Johnson, 149 Ill.App.3d 465, 500 N.E.2d 728 (3d Dist. 1986) The prosecutor stated that although defendants are entitled to certain rights the defendant was not an innocent man. The Court held that though this remark "could be construed as allowable comments on the defendant's guilt established by the evidence, the remark was unwarranted and improperly diminished the presumption of innocence." The prosecutor also said the evidence was overwhelming and this was an "open and shut" case. The Court held that though the comments were "generally based upon the evidence and in response to the defendant's challenge to the credibility of the State's witnesses," they "went beyond simple inferences from the evidence and may have tended to infringe on the fact-finding function of the jury." Finally, it was improper for the prosecutor to align himself with the jury by saying that it is "our job to find the facts."

People v. Lee, 229 Ill.App.3d 254, 593 N.E.2d 800 (1st Dist. 1992) Defendant was convicted after the arresting officer, the only eyewitness to the crime, was unable to make an identification. During closing argument, the prosecutor stated that the officer was "extremely honest in my humble opinion" because he had not lied and made an in-court identification despite his inability to remember the offender. The trial court overruled a defense objection, stating, "[I]t is appropriate argument." The Court reversed, finding that the prosecutor improperly interjected his personal opinion about a witness's credibility. Because the officer's testimony was essential to the State's case, and because during deliberation the jury asked four questions about that testimony, the error was not harmless.

People v. Davis, 287 Ill.App.3d 46, 677 N.E.2d 1340 (1st Dist. 1997) The prosecutor erred by expressing his opinion that defense witnesses "were the worst liars he had ever seen testify."

People v. Williams, 2015 IL App (1st) 122745 (No. 1-12-2745, mod. op. 5/5/15)

Although prosecutors have wide latitude in making closing arguments and are allowed to comment on the evidence and reasonable inferences from the evidence, they are not permitted to vouch for the credibility of a witness or use the credibility of their office to bolster testimony. By vouching for the credibility of a witness, the prosecutor improperly conveys two messages: (1) evidence not presented but known to the prosecutor supports the charges against defendant; and (2) the prosecutor's opinion carries the imprimatur of the Government and thus the jury should trust the Government's judgment rather than its own view of the evidence.

Here, the primary evidence against defendant came from the testimony of a fellow gang member and co-defendant who turned State's evidence. During closing arguments, the State told the jury that when co-defendant agreed to cooperate, the State didn't just accept what he said, but instead did further investigation to check out and corroborate his version of events.

The Appellate Court held that this argument was reversible error. The court found it especially problematic since the message here was that the State would not put an untruthful witness on the stand. The prosecutor explicitly told the jury that the co-defendant's statement had been assessed before he testified and urged the jury to believe his version of events because the government had verified what he said. "With those comments, the testimony essentially became that of the prosecutor rather than that of the witness."

The case was reversed and remanded for a new trial.

(Defendant was represented by Assistant Defender Emily Filpi, Chicago.)

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§41-9
Comments on Defendant's Failure to Testify

Griffin v. California, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965) The Fifth Amendment precludes comment by the court or prosecutor concerning the defendant's failure to testify.

Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) The prosecutor's closing argument, in which he stated that the State's evidence was "unrefuted" and "uncontradicted," did not constitute an improper comment on the defendant's failure to testify. The jury had been "promised a defense" by defense counsel and told that the defendant would testify, and the "closing remarks added nothing to the impression that had already been created" by defendant's refusal to testify.

People v. Wollenberg, 37 Ill.2d 480, 229 N.E.2d 490 (1967) The prosecutor may not make reference to the defendant's failure to testify. The prosecutor's comment here (that "no one else testified, let's get that straight") was reversible error.

People v. Ramirez, 98 Ill.2d 439, 457 N.E.2d 31 (1983) It was improper, at a capital sentencing hearing, for the prosecutor to comment that the defendant "has sat silent before you . . . and offered no explanation for the murder."

People v. Bryant, 94 Ill.2d 514, 447 N.E.2d 301 (1983) The prosecutor's statement in closing argument (that the State's evidence was "uncontradicted") was not an improper comment on

the defendant's failure to testify. Instead, the statement served only to emphasize the strength of the State's case. See also, **People v. Mills**, 40 Ill.2d 4, 237 N.E.2d 697 (1968); **People v. Hunter**, 124 Ill.App.3d 516, 464 N.E.2d 659 (1st Dist. 1984) ("unrebutted and uncontradicted"); **People v. Leonard**, 171 Ill.App.3d 380, 526 N.E.2d 398 (2d Dist. 1988) ("uncontradicted").

People v. Weinger, 101 Ill.App.3d 857, 428 N.E.2d 924 (1st Dist. 1981) It was improper for the prosecutor to say that the State's case was "undenied." The word "undenied" points at the defendant and may focus the jury's attention on his failure to testify.

People v. Dixon, 91 Ill.2d 346, 438 N.E.2d 180 (1982) During rebuttal argument, the prosecutor stated, "Did you hear any testimony whatsoever of what was going on in the defendant's mind." The defendant contended that the above remark constituted an improper comment on his decision not to testify. The Court held that the prosecutor's remarks were invited by defense counsel's argument to "keep in mind what is going on in [defendant's] mind." The prosecutor's remarks were made to demonstrate the absence of any evidentiary basis for defense counsel's argument and not for the purpose of calling attention to defendant's failure to testify.

People v. Lyles, 106 Ill.2d 373, 478 N.E.2d 291 (1985) In closing argument, defense counsel suggested that defendant's confession had been coerced. In response, the prosecutor stated that "what the police said is uncontradicted, unrebutted," and that there was "[n]o evidence that says it happened any other way than that." The Court held that these remarks did not direct the jury's attention to defendant's failure to testify. Rather, they were a legitimate response to defense counsel's suggestion that defendant's confession may have been coerced. Where defense counsel provokes a response, defendant cannot complain that the State's reply denied him of a fair trial.

People v. Morgan, 112 Ill.2d 111, 492 N.E.2d 1303 (1986) The prosecutor's comments that "[d]on't you think that somebody has some explaining to do," that defendant presented his defense "through his lawyer" and that defendant "had his opportunity to confront the witnesses against him and bring his evidence forward") were not comments on defendant's failure to testify but on the strength of the State's circumstantial evidence.

People v. Herrett, 137 Ill.2d 195, 561 N.E.2d 1 (1990) An armed robbery was committed by a black man (alleged to be defendant) and a white man. The police traced the car used in the crime to a residence of a man named Shigemura. The police went to the residence and arrested the defendant and a white man. Proceeds of the robbery were found in the residence. The defendant did not testify. During argument, the prosecutor stated, "You have no testimony why he was there. . . . [T]here is no reason given why [defendant] was at that house." The Court held that the prosecutor's remarks were an impermissible comment on defendant's failure to testify. See also, **People v. Arman**, 131 Ill.2d 115, 545 N.E.2d 658 (1989).

People v. Connolly, 187 Ill.App.3d 234, 543 N.E.2d 138 (4th Dist. 1989) Eighteen times during closing argument, the prosecutor referred to the State's evidence as undisputed, uncontradicted and undenied. In reversing on another ground, the Appellate Court cautioned, " While such comments may have been made only to emphasize the strength of the State's case, there is a point where they over reach the limits of acceptable argument. Moreover[,]

. . . [while] 'uncontradicted' could apply to almost anyone, 'undenied' points more at the defendant. Anyone can contradict anything, but one denies an accusation."

People v. Edgecombe, 317 Ill.App.3d 615, 739 N.E.2d 914 (1st Dist. 2000) Generally, prosecutors may comment that the evidence is uncontradicted, even where the defendant is the only person who could have provided contrary evidence. However, a prosecutor may not comment directly or indirectly on the defendant's exercise of his right not to testify. In deciding whether a comment was improper, the court should examine the challenged comments in the context of the entire record and determine whether the reference was intended "to direct the attention of the jury to the defendant's neglect to avail himself of the right to testify." Here, the prosecutor not only stated that the evidence was uncontradicted, but "repeatedly argued by inference that the victim was the only person who provided testimony about the armed robbery" and that "no one" contradicted "certain aspects of the State's evidence." The court concluded, "[W]e can only conclude that the prosecutor's remarks were designed to focus the jury's attention upon the defendant's failure to testify."

People v. Derr, 316 Ill.App.3d 272, 736 N.E.2d 693 (5th Dist. 2000) Generally, it is permissible for the State to point out that evidence is uncontradicted, even if the only person who could have provided contrary evidence is the defendant. Prosecutors owe defendants "a duty of fairness," however, and such remarks may not be made in an attempt to direct the attention of the jury to the defendant's failure to testify. Here, the prosecutor's "intent and motive were made perfectly clear by his comments outside the presence of the jury"; the remarks were part of a "concerted effort to highlight defendant's failure to testify and shift the burden of proof." In view of the cumulative effect of the comments and the closeness of the evidence, defendant was denied a fair trial.

People v. Monroe, 95 Ill.App.3d 807, 420 N.E.2d 544 (1st Dist. 1981) Where the crucial State's evidence was the defendant's confession, the prosecutor erred by arguing that "[defendant] admitted [the crime] and he doesn't want to admit it now," that defendant did not want to admit his guilt "because he doesn't want to face the consequences," and that the confession "is uncontradicted and undenied by any single person." Such statements "can only be construed to have had the purpose of suggesting that defendant's failure to testify was evidence of his guilt."

People v. Johnson, 102 Ill.App.3d 122, 429 N.E.2d 905 (3d Dist. 1981) In an attempt arson trial, the defense introduced a property card showing that when defendant was arrested he had no ignition source. The prosecutor emphasized that the State's case was uncontradicted and held up the property card, saying "this is the sum total, the whole defendant's case." The Court held that the repeated verbal references to the uncontradicted nature of the State's case, coupled with the emphasis supplied by the visual display of the property card, impermissibly focused the jury's attention on the defendant's failure to testify.

People v. Burton, 63 Ill.App.3d 915, 380 N.E.2d 929 (1st Dist. 1978) The prosecutor acted improperly by eliciting testimony that the defendant had testified at a prior trial concerning the same incident and by stating that defendant never got on the stand in this case.

People v. Ray, 126 Ill.App.3d 656, 467 N.E.2d 1078 (1st Dist. 1984) The prosecutor made prejudicial comments by arguing that defense counsel misled the jury in his opening statement

by saying that defendant "would get up there and he would say that he did not do it, but he was there." "[D]efendant has "an absolute right not to testify [and] any comment by the State directing the jury's attention to that decision violates his rights." The prejudice accruing to defendant was exacerbated here because the remark misstated the substance of counsel's opening statement — which never suggested that defendant would testify.

People v. Tipton, 222 Ill.App.3d 657, 584 N.E.2d 310 (1st Dist. 1991) Defendant was convicted of the aggravated criminal sexual assault of his cellmate after the State presented testimony by the complainant that defendant placed an object to his throat, threatened him, and forced him to engage in anal intercourse. Although the complainant reported the incident to a jail officer the next morning, no weapon was found in the cell. During closing argument, the prosecutor stated:

> "[Complainant] tells you that there was an object used, some type of object placed against his throat where the mark was. What that object was, we'll never know. Mr. Tipton knows. We'll never know what that object was. [Citation omitted] Where that object ended up we'll never know. Mr. Tipton knows. We'll never know."

The Court held that the above comments improperly called attention to the fact that defendant did not testify, because the prosecutor referred to defendant by name and emphasized that he had not explained what the object was or its disappearance. The Court found that the prosecutor's remarks were "particularly dismaying" because there was ample evidence on which defendant could have been convicted. Although the case presented a close question on harmless error, the Court ordered a new trial "due to the great number of cases coming before us involving valid claims of prosecutorial misconduct."

People v. Smith, 402 Ill.App.3d 538, 931 N.E.2d 864 (1st Dist. 2010)

A defendant has a constitutional right not to testify and a prosecutor may not comment on a defendant's failure to take the stand or to call witnesses.

Defendant was convicted of attempt murder of a police officer. The State presented evidence that an officer in an unmarked car boxed defendant's car into its parking spot as part of an effort by the police to arrest defendant. Other marked cars came to the scene to assist. An officer stood on the sidewalk in front of defendant's car and identified himself as a police officer. Defendant looked down on the floor of his car, then drove onto the sidewalk, hitting the officer in the side as the officer dove away. Ultimately, defendant crashed into another police car. A gun was found on the floor of defendant's car. Defendant was ticketed for driving on the sidewalk and eluding the police. Defendant did not testify at trial.

In closing argument to the jury, the prosecutor told the jurors that they had heard no evidence that defendant did not know they were not the police or that he was not trying to kill anyone. Defense objections to this argument were overruled. The Appellate Court held that the prosecutor's argument violated the defendant's right to remain silent and shifted the burden of proof to defendant. The court could not conclude that the remarks did not contribute to defendant's conviction. The defendant's failure to use the gun and the tickets defendant received supported the inference that he only intended to elude the police and acted in reckless disregard for the safety of the officer in attempting to flee.

The Appellate Court reversed the conviction and remanded for a new trial.

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§41-10
Comments on Defendant's Failure to Call Witnesses

People v. Kubat, 94 Ill.2d 437, 447 N.E.2d 247 (1983) The Court held that the prosecutor properly remarked in closing argument that a certain alibi witness was not called by the defendant. "Where a defendant injects into the case the name of an alibi witness and then fails to call the witness, the prosecutor may legitimately comment on the lack of such evidence although it may not be relied upon as proof of the charge." See also, **People v. Plantinga**, 132 Ill.App.3d 512, 477 N.E.2d 1299 (1st Dist. 1985); **People v. Taylor**, 137 Ill.App.3d 148, 484 N.E.2d 383 (5th Dist. 1985).

People v. Nevitt, 135 Ill.2d 423, 553 N.E.2d 368 (1990) Defendant was convicted for a sex offense against a child at a day care center where defendant was employed. Defendant attempted to show, through co-workers' testimony, that he was not at the day care center at the relevant time. However, defendant did not present any evidence as to where he was at that time. During closing argument, the prosecutor stated,"[W]here are the defense witnesses to tell you where [defendant] was in the morning? Did you hear one single witness come in here and tell you where [he] was[?]" Although a prosecutor may comment on the lack of alibi evidence where a defendant injects the name of alibi witnesses in the case and then fails to call them, the defendant did not present any evidence of his whereabouts at the time of the alleged crime. Thus, it was improper for the prosecutor to comment on defendant's failure to produce alibi witnesses.

People v. Adams, 109 Ill.2d 102, 485 N.E.2d 339 (1985) At a trial for the murder and robbery of a drug store owner, the defendant claimed that he had been a customer in the store, purchased a bottle of vitamins, and left the vitamins at the home of a person named McClaine. McClaine was not called as a witness, and the prosecutor commented on the defendant's failure to produce McClaine. The Court held that the comment was not error - "The locating of McClaine presumably was under the control or within the knowledge of the defendant, and she could have testified to a vital matter of Adams' defense."

People v. Eiland, 217 Ill.App.3d 250, 576 N.E.2d 1185 (5th Dist. 1991) It was not improper for the prosecutor to comment upon defendant's failure to call a witness whose name had been injected into the case by the defense, especially since it was fair to infer that the witness was more accessible to the defendant than to the State. However, it was improper for the prosecutor to suggest that the defense should have called the witness where the prosecutor knew that the witness would refuse to answer any questions. Since it is improper to call a witness who is expected to invoke his Fifth Amendment privilege, the "prosecutor's comments misled the jury as to the ability of defense counsel to call" the witness.

People v. Eddington, 129 Ill.App.3d 745, 473 N.E.2d 103 (4th Dist. 1984) The prosecutor erred by commenting that the defendant failed to call three people as alibi witnesses whose existence was interjected in the case by the State's own witnesses. The State argued that the comment was not prejudicial because the jury was instructed on the purposes of argument and

the burden of proof. The Court rejected this contention — "If error of this nature were deemed so easily cured, the prosecution could violate the rule and argue harmless error in any case."

People v. Wills, 151 Ill.App.3d 418, 502 N.E.2d 775 (2d Dist. 1986) The evidence showed that defendant cashed a check made out to one Leavy Napoleon. The check was endorsed with a signature purporting to be Napoleon's. However, Napoleon testified that the check was his retirement fund check and that he never received it, endorsed it or gave anyone permission to endorse it. The defendant testified that she cashed the check for a Denise Coleman and that Coleman said that Napoleon was her grandfather, who was too sick to cash the check. Denise Coleman was listed on the State's list of witnesses, but before trial the prosecutor informed the judge that Coleman could not be found. Defense counsel also stated that he could not find Coleman. During closing argument the prosecutor, over objection, commented that the defendant's testimony was not corroborated by Coleman and that Coleman did not testify. The Court held that it was improper for the prosecutor to comment on the defendant's failure to call Coleman. The Court noted that Coleman was not an alibi witness, and distinguished this case from cases in which it has been held proper for the prosecutor to comment on the defendant's failure to call *alibi* witnesses after the defense injects their names into evidence.

People v. Lee, 128 Ill.App.3d 774, 471 N.E.2d 567 (1st Dist. 1984) The defendant testified about an incident which occurred while he was hospitalized for psychiatric treatment following his service in Vietnam. The prosecutor remarked that defendant failed to call as witnesses doctors who were told about this incident. The names of these doctors were listed in defendant's answer to discovery. The Court held that it was improper for the prosecutor to comment unfavorably on the failure to produce the doctors since they were equally available to the State.

People v. Doe, 175 Ill.App.3d 371, 529 N.E.2d 980 (1st Dist. 1988) It is improper for the prosecutor to comment on defendant's failure to present witnesses when such witnesses are equally accessible to both parties; however, when locating witnesses is under the defendant's control or within his knowledge, comments on the failure to produce witnesses are not improper. Here, the prosecutor's comment on defendant's failure to call two witnesses was not improper where defendant was engaged to one and lived with the other.

People v. Wilson, 120 Ill.App.3d 950, 458 N.E.2d 1081 (1st Dist. 1983) During closing argument the prosecutor commented, over objection, that only one psychiatrist testified that defendant was insane and that defendant's "primary psychiatrist did not testify." The Court held that this argument was "improper and unprofessional"; the defendant had sought to present the testimony of the "primary psychiatrist," but was prevented by certain court rulings. In addition, the subpoena for the psychiatrist had been quashed at the urging of the State.

People v. Lopez, 152 Ill.App.3d 667, 504 N.E.2d 862 (1st Dist. 1987) In closing argument, the prosecutor named 11 people as potential alibi witnesses and asked several times where they were. This was error because the names were injected into the case by the prosecutor and the argument suggested that the people would have testified unfavorably to the defense.

People v. Armstead, 322 Ill.App.3d 1, 748 N.E.2d 691 (1st Dist. 2001) Due to the closeness of the evidence, plain error occurred where the prosecutor shifted the burden of proof to the

defense by referring to defendant's failure to call witnesses whose names had been elicited from a State's witness by the prosecutor, who also cross-examined the defendant about the witnesses.

People v. Moya, 175 Ill.App.3d 22, 529 N.E.2d 657 (1st Dist. 1988) The defendant attempted to introduce evidence as to why his mother, an alibi witness, did not testify, but this evidence was excluded. In closing argument, the prosecutor stated that the defendant's mother was not in court because she "wouldn't get on the stand and lie for him." The Court held that these remarks were "made for the sole purpose of prejudicing the defendant."

People v. Johnson, 202 Ill.App.3d 417, 559 N.E.2d 1041 (1st Dist. 1990) Defense counsel's argument (that the State failed to make sufficient efforts to call certain witnesses and that their testimony may have been favorable to the defendant) did not invite response that the witnesses did not testify because of fear; there was no evidence to support the prosecutor's claim.

People v. Dillard, 68 Ill.App.3d 941, 386 N.E.2d 416 (1st Dist. 1979) If defense counsel argues that the State did not call certain witnesses, it is proper for the prosecutor to respond by asking why the defense did not call them. See also, **People v. Brown**, 122 Ill.App.3d 452, 461 N.E.2d 71 (2d Dist. 1984); **People v. Medley**, 111 Ill.App.3d 444, 444 N.E.2d 269 (4th Dist. 1983).

People v. Huddleston, 176 Ill.App.3d 18, 530 N.E.2d 1015 (1st Dist. 1988) Counsel may comment on opposing counsel's failure to produce evidence promised in opening statement so long as the comments do not reflect upon the defendant's failure to testify. See also, **People v. Quinn**, 173 Ill.App.3d 597, 527 N.E.2d 905 (1st Dist. 1988) (proper for the prosecutor to comment on the defendant's failure to produce a certain person as a witness where the person was first mentioned in the defense opening statement).

People v. Lawrence, 259 Ill.App.3d 617, 631 N.E.2d 852 (2d Dist. 1994) During argument, the prosecutor referred to the defendant's claim that he had been with two other men and noted that the jury "didn't see them coming in here and testifying and backing him up." The Court held that the prosecutor committed reversible error by commenting on defendant's failure to call witnesses who were equally accessible to both parties. Although the prosecutor may comment on defendant's failure to call potential alibi witnesses introduced into the case by the defense, the potential witnesses here were brought up by the State's witnesses. In addition, the witnesses were not more accessible to the defense merely because they were listed in defendant's discovery; the record showed that one witness could not be located by either side, and the second was accessible to both sides but was of questionable credibility. In addition, the prosecutor's comments were especially prejudicial because the trial court struck the testimony of the only witness to support the defendant's alibi for the exact time of the offense.

Cumulative Digest Case Summaries **§41-10**

People v. Euell, 2012 IL App (2d) 101130 (No. 2-10-1130, 5/16/12)

It is improper for a prosecutor to make comments that shift the burden of proof to

defendant or shift the burden to the defendant to elicit exculpatory evidence.

The prosecutor's argument shifted the burden of proof to defendant by commenting not just that there was no evidence supporting the defense theory, but there was "no evidence of that from the defense standpoint." This statement was not an argument that the defense theory was not a reasonable inference from the evidence, but told the jury not to give credence to the defense theory because defendant had not presented any evidence in support of that theory.

The State effectively shifted the burden to the defendant to elicit exculpatory evidence when it commented on the questions defense counsel should have but did not ask the prosecution's primary witness.

The court affirmed defendant's conviction because the comments were not plain error.

(Defendant was represented by Assistant Defender Christopher McCoy, Elgin.)

People v. Mpulamasaka, 2016 IL App (2d) 130703 (No. 2-13-0703, 2/17/16)

The court found that the prosecutors committed error in several respects during closing argument, and that it was "reasonably certain that but for the errors . . . the jury's verdict would have been not guilty."

1. The prosecutors erred where they used evidence that had been introduced on a count for which a directed verdict had been granted to establish an element of another count. Although the trial court neglected to tell the jury that a directed verdict had been ordered on the count to which the evidence was relevant, and defense counsel failed to request such an instruction, that oversight "did not give the State license" to use the evidence to confuse the jury concerning the remaining charges.

2. Where defendant was charged with aggravated criminal sexual assault, the prosecutors erred by referring to him in closing argument as a "predator" who took "a piece of meat" home. "Each of these remarks was clearly improper and an attempt to cultivate anger toward defendant."

3. The prosecutors erred in closing argument by making statements which attacked the integrity and denigrated the testimony of a defense expert. Although the State did not challenge the expert's qualifications, it argued that he "was at the rent-a-doctor agency sipping a latte" and sold his integrity "for three pieces of silver." At the same time, the State misstated the expert's testimony.

The court noted that the trial court overruled defense objections to the argument, giving the jury the impression that the statements accurately described the expert's opinion. Furthermore, some of the improper remarks were made in the State's rebuttal, when the defense had no chance to respond.

4. The prosecutors erred by arguing that the complainant's testimony on cross-examination, which supported defendant's claim of consent, was the result of misleading and confusing questioning by defense counsel. There was no evidence that the complainant had any trouble understanding defense counsel's questions, and urging the jury to ignore the testimony on cross-examination because it was "not [the complainant's] words" violated the right to confront witnesses and the right to a fair trial.

5. The prosecutor engaged in misconduct by sitting at the witness stand in closing argument while arguing about the complainant's "courage in testifying" and commenting on defendant's credibility (despite the fact that defendant did not testify). "Whether intentionally or not, by arguing S.B.'s courage and then transitioning to defendant's credibility, the prosecutor might have reminded the jury that defendant did not testify, especially when the argument was made from the witness chair."

Furthermore, the tactic of "leaving the podium and sitting in the witness chair . . . was designed to evoke sympathy for [the complainant] and disgust for defendant." In rejecting the State's argument that defendant cited no authority that a party cannot sit in the witness chair during closing argument, the court stated: "There does not need to be a case precedent to establish that certain conduct is improper. Many practices and customs have been historically followed in the trial process."

The court concluded that even in the absence of a defense objection, the trial court should have prevented the prosecutor from arguing from the witness stand.

6. Finally, the prosecution erred by ending its rebuttal with a "final appeal to sympathy" by calling defendant a "bully" who took advantage of the "weakest among us." "[G]uilty verdicts may not be based on sympathy."

(Defendant was represented by former Assistant Defender Barb Paschen, Elgin.)

People v. Smith, 402 Ill.App.3d 538, 931 N.E.2d 864 (1st Dist. 2010)

A defendant has a constitutional right not to testify and a prosecutor may not comment on a defendant's failure to take the stand or to call witnesses.

Defendant was convicted of attempt murder of a police officer. The State presented evidence that an officer in an unmarked car boxed defendant's car into its parking spot as part of an effort by the police to arrest defendant. Other marked cars came to the scene to assist. An officer stood on the sidewalk in front of defendant's car and identified himself as a police officer. Defendant looked down on the floor of his car, then drove onto the sidewalk, hitting the officer in the side as the officer dove away. Ultimately, defendant crashed into another police car. A gun was found on the floor of defendant's car. Defendant was ticketed for driving on the sidewalk and eluding the police. Defendant did not testify at trial.

In closing argument to the jury, the prosecutor told the jurors that they had heard no evidence that defendant did not know they were not the police or that he was not trying to kill anyone. Defense objections to this argument were overruled. The Appellate Court held that the prosecutor's argument violated the defendant's right to remain silent and shifted the burden of proof to defendant. The court could not conclude that the remarks did not contribute to defendant's conviction. The defendant's failure to use the gun and the tickets defendant received supported the inference that he only intended to elude the police and acted in reckless disregard for the safety of the officer in attempting to flee.

The Appellate Court reversed the conviction and remanded for a new trial.

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§41-11
Comments About Witnesses

People v. Johnson, 114 Ill.2d 170, 499 N.E.2d 1355 (1986) The prosecutor may properly comment that a defense witness was lying, if based on the evidence. See also, **People v. Tiller**, 94 Ill.2d 303, 447 N.E.2d 174 (1982).

People v. Nitz, 143 Ill.2d 82, 572 N.E.2d 895 (1991) The prosecutor stated that a State's witness should be believed because "we have been able to corroborate all or almost all of everything that she said from the witness stand." The Court held that the prosecutor did not

improperly interject his personal belief about the veracity of the witness, but merely made "a fair comment . . . that a witness is believable because her testimony was corroborated."

People v. Lyles, 106 Ill.2d 373, 478 N.E.2d 291 (1985) At a death penalty sentencing hearing, the prosecutor referred to a psychiatrist (who had been called as a defense witness) as a "liar", "a fraud" and "a member of the oldest profession known to man." The comments were found to be "improper and inflammatory and constituted nothing less than character assassination." In addition, the evidence did not support the prosecutor's remarks. The fact that other experts voiced opinions different from the witness did not justify calling him a liar.

People v. Moss, 205 Ill.2d 139, 792 N.E.2d 1217 (2001) During cross-examination of a defense mental health expert at sentencing, the prosecutor asked whether the witness claimed that defendant's crimes were caused "by some boo-boo to the head." In closing argument, the prosecutor urged the jury to weigh the State's evidence against defendant's "boo-boo to the brain," described defense evidence as "psycho-babble that went on and on and on," and referred to defense experts as "cash for trash doctors," and said that a natural life sentence would give defendant "an American Express Gold Card . . . to assault correctional officers, prison staff, and cafeteria workers." Defendant waived any error by failing to object to most of the comments and by failing to raise the issue in his posttrial motion. The court added, however:

> "This conclusion should not be interpreted in any way as condoning improper prosecutorial remarks that have become all too frequent in criminal trials. The prosecutor's use of sarcasm to describe Dr. Hardy's diagnosis as a "boo-boo to the head" and reference to both expert witnesses as "cash for trash doctors" is completely unacceptable. Although a new trial is not always a necessary sanction for improper remarks of a prosecutors, comments degenerating defendant's witnesses must be strongly condemned."

People v. Kokoraleis, 132 Ill.2d 235, 547 N.E.2d 202 (1989) It was not improper for the prosecutor to tell the jurors that they would have to decide whether the defendant or the State witnesses were lying, and that the defendant was guilty if the Assistant State's Attorney who took defendant's statements was not lying. Defense counsel in his argument suggested that the State witnesses were lying, and "it was not improper for the prosecutor to respond in kind."

People v. Thomas, 137 Ill.2d 500, 561 N.E.2d 57 (1990) During trial, one prosecutor testified about certain statements made by the defendant. In closing argument another prosecutor stated that the witness "is a sworn Assistant State's Attorney, sworn to uphold the laws" and that "there isn't one iota of evidence to suggest that [he] came into this courtroom and risked his law license by lying."The Court held that this comment was improper, but harmless.

People v. Nuccio, 43 Ill.2d 375, 253 N.E.2d 353 (1969) Reversible error for prosecutor, during cross-examination, to make repeated, unsupported insinuations that defendant and his witnesses had engaged in certain reprehensible conduct; the State had failed to present appropriate rebuttal testimony in response to defense witnesses' specific denial of misconduct.

People v. Collins, 106 Ill.2d 237, 478 N.E.2d 267 (1985) Defense counsel in closing argument stated that "they want Collins so bad . . . that they made a guy come in here and tell you something that he knows is not in that report." In rebuttal, the prosecutor stated that he would not jeopardize his license, family, children and future by putting a witness on and make him lie. The Supreme Court rejected the defendant's contention that the reference by the prosecutor to his personal integrity was error. "The prosecutor's integrity had been challenged by the defense's assertion that he had put a witness on the stand and made him lie. This response by the prosecutor was invited and cannot be relied on as error."

People v. McKinney, 117 Ill.App.3d 591, 453 N.E.2d 926 (1st Dist. 1983) The prosecutor said that a certain eyewitness showed courage in testifying because "he knew he would have to return to [his] home . . . which is within blocks of the McKinney home and many of the McKinneys, of course, are not in custody." The Court stated that this comment "was clearly an improper attempt to bolster the credibility of [the eyewitness.]"

People v. Ford, 113 Ill.App.3d 659, 447 N.E.2d 564 (3d Dist. 1983) Improper to argue the State's witness was more credible than the defendant because the State's witness was a police officer. See also, **People v. Clark**, 186 Ill.App.3d 109, 542 N.E.2d 138 (1st Dist. 1989).

People v. Rogers, 172 Ill.App.3d 471, 526 N.E.2d 655 (2d Dist. 1988) The prosecutor improperly expressed his personal belief as to the credibility of two police officers by saying: "What can I say about [the officers] . . . seasoned veterans on the police force, credibility untouchable. . . . [T]hey won't get on the stand and lie and make up something."

People v. Harris, 182 Ill.App.3d 114, 537 N.E.2d 977 (1st Dist. 1989) Where the evidence showed that a certain witness agreed to testify only after he was visited by the defendant, it was proper for the prosecutor to comment: "Doesn't it stun you to hear that on Monday [the witness] tells one story, he's talked to on Wednesday night by the defendant and then he comes in with a totally different story today. [Friday]" The Court stated, "[T]here was sufficient evidence of coerced testimony" so that "the inference by the prosecutor was not unfounded."

People v. Slabaugh, 323 Ill.App.3d 723, 753 N.E.2d 1170 (2d Dist. 2001) The prosecutor erred by arguing that two defense witnesses, both school teachers, fostered disrespect for law enforcement by refusing to talk to police officers or the prosecutor before trial. Although a witness's refusal to be interviewed by an opposing party's attorney may be probative of bias, no authority "allows a prosecutor to argue that a witness's refusal to be interviewed before trial is evidence that the witness is teaching children an attitude of disrespect for law enforcement."

People v. Abadia & Arias, 328 Ill.App.3d 669, 767 N.E.2d 341 (1st Dist. 2001) The prosecutor erred by arguing that defense counsel mistreated the State's primary eyewitness. The court stated, "We fail to understand how the defense 'abused' the witness in asking questions about potential inconsistencies in the witness' testimony."

People v. Clark, 335 Ill.App.3d 758, 781 N.E.2d 1126 (3d Dist. 2002) The prosecutor committed plain error in closing argument by repeatedly commenting that the victim of armed robbery and home invasion was over 80, that defendant's alibi witnesses lacked credibility because they had gone to a tavern, and that defendant might have committed a more serious

crime had the victim seen him before the offense. The statements about the victim's age were not mere references to the evidence, but assertions that defendant should be convicted because the elderly, as a class, need to be protected. The argument that alibi witness were unworthy of belief because they had gone to bars was irrelevant, because there was no evidence to suggest that either defendant or his alibi witnesses were intoxicated or impaired in their ability to recall events. Finally, although the victim testified that her attacker had a knife and could have cut her throat, the prosecutor's argument that defendant might have committed a more serious crime had nothing to do with his guilt or innocence of the charged crime and served no purpose other than to inflame the jury's passions.

People v. Trass, 136 Ill.App.3d 455, 483 N.E.2d 567 (1st Dist. 1985) It was proper for the prosecutor to suggest that a defense witness had made up her story about defendant's whereabouts because, "[having lived with defendant for ten years], it was reasonable to infer that she was lying about his whereabouts on the night of the crimes."

People v. Burba, 134 Ill.App.3d 228, 479 N.E.2d 936 (1st Dist. 1985) The prosecutor's references to the friendship between a defense expert witness and defense counsel was "within the bounds of proper closing argument"; the expert testified he had known counsel for a "year or two" and had "rescheduled his appointments" to be in court.

People v. Rader, 178 Ill.App.3d 453, 532 N.E.2d 1365 (1st Dist. 1988) The prosecutor properly commented that defense witness lied and State witnesses told the truth - the prosecutor was commenting on the credibility of the witnesses and did not interject his own beliefs. See also, **People v. Bratton**, 178 Ill.App.3d 718, 533 N.E.2d 572 (4th Dist. 1988).

People v. Barnes, 107 Ill.App.3d 262, 437 N.E.2d 848 (1st Dist. 1982) In reference to a defense character witness, the prosecutor stated: "[E]very murderer has somebody who likes him, thinks he is a good boy. John Gacy's mother would have come in and said her son was a good boy." The Court held that it was "clearly improper" for the prosecutor to attempt to "inject into this case the image of a mass murderer whose case was fresh in the public mind."

People v. Hayes, 183 Ill.App.3d 752, 539 N.E.2d 355 (1st Dist. 1989) During closing argument, the prosecutor told the jury about a personal incident that was factually similar to the complainant's testimony. This argument was improper because it went far beyond the evidence and placed the integrity of the prosecutor's office behind the complainant's credibility.

People v. Roach, 213 Ill.App.3d 119, 571 N.E.2d 515 (1991) Plain error occurred when the prosecutor said that he thought several State's witnesses were sincere, that he "didn't get the feeling" that a particular State's witness was lying, that he "couldn't buy anything" a defense witness said because the witness admitted lying to a detective before, and that defendant "didn't strike me as a guy who's being wrongfully accused."

People v. Schaefer, 217 Ill.App.3d 666, 577 N.E.2d 855 (5th Dist. 1991) The defendant was convicted of possession of cannabis with intent to deliver. A State witness named Quillman testified that defendant had previously sold cannabis to him. Quillman admitted that drug charges against him were dismissed in exchange for his testimony. The prosecutor stated, "Robert Quillman was saving his butt, but he told the truth. Quillman is not the most stellar person in the universe but I think he told the truth." The Court held that by making these

remarks the prosecutor improperly voiced his personal opinion and vouched for the credibility of Quillman. "Even taken in context, the prosecutor clearly implied that he 'knew' Quillman was telling the truth based upon his experience as a State's Attorney. Such a statement was clearly improper."

People v. Adams, 2012 IL 111168 (No. 111168, 1/20/12)

1. Noting a conflict in Illinois authority, the Supreme Court found that the prosecutor erred in closing argument by stating, in the absence of any evidence concerning the consequences of a police officer lying in court, that police officers would not risk their "credibility," "jobs," and "freedom" by lying in court. The court noted that the weight of authority from other jurisdictions holds that such comments are improper, and concluded that in the absence of evidence from which it could be inferred that testifying officers risk their careers if they testify falsely, such comments are impermissible speculation. Furthermore, such argument implies that a police officer has a greater reason to testify truthfully than a witness with some other type of occupation, and violates the principle that a prosecutor may not argue that a witness is more credible because of his or her status as a police officer.

2. However, the improper remarks were not plain error where defendant's testimony was highly improbable, the jury was properly instructed that counsel's arguments were not evidence and that the jury was to judge credibility, and the comments did not affect the fairness of the trial to the extent that the integrity of the judicial process was threatened.

3. The prosecutor did not act improperly by arguing that the defendant had "two and a half years to come up with the story he told you today." The court found that remark did not violate **Doyle v. Ohio**, 426 U.S. 610 (1976), which holds that once a defendant has received **Miranda** warnings due process prohibits prosecutorial comments on post-arrest silence for purposes of impeachment. The court concluded that the prosecutor's argument was not impeachment of defendant's exculpatory testimony by use of his earlier silence; "instead, [the prosecutor] commented on petitioner's credibility as a witness by alluding to petitioner's opportunity to perfect his account." (Quoting **Melendez v. Scribner**, 2006 WL 2520301 (E.D. Cal. 8/3/06)).

(Defendant was represented by Assistant Defender Bryon Kohut, Ottawa.)

People v. Adams, 403 Ill.App.3d 995, 934 N.E.2d 1073 (3d Dist. 2010)

The prosecutor committed reversible error when he argued that due to their profession, police officers were more credible witnesses than the defendant. The prosecutor also erred by attempting to boost the credibility of a police officer based on evidence that had not been introduced.

1. Illinois courts are divided on whether it is permissible for a prosecutor to argue credibility based on the status of a police officer and the possible repercussions of testifying falsely. Cases permitting such argument generally hold that the statements are proper comments based on the evidence or on inferences drawn from the evidence. By contrast, cases disallowing such statements generally hold that a police officer is not more credible solely because of his or her profession.

In this case, the court concluded that such statements are improper because they attempt to bolster a witness's credibility solely due to his or her status. "[A] person is not more credible merely because he or she chooses the profession of a police officer."

Thus, the prosecutor erred by arguing that two officers were credible because one was an eight-and-one-half-year veteran of the police department and the other had been an officer for five years. Similarly, the prosecutor erred by arguing that the officers would not risk their jobs, freedom and reputations by lying under oath.

Although defense counsel failed to object, the court concluded that plain error occurred because the evidence was closely balanced and the verdict depended on whether the jury believed the officers' testimony or that of the defendant. Because the verdict could have been affected by the improper argument, a new trial was required.

2. The prosecutor also committed plain error by arguing that the officer who claimed to have found the cocaine in defendant's pocket "locked himself in to his version of events" by preparing a police report shortly after the incident, while defendant "had almost two and a half years to come up with the story he told you today." Arguments must be based on the evidence, and there was no evidence that the officer had prepared a report after the offense or what such a report contained.

The conviction was reversed and the cause remanded for a new trial.

(Defendant was represented by Assistant Deputy Defender Verlin Meinz, Ottawa.)

People v. Boling, 2014 IL App (4th) 120634 (No. 4-12-0634, 3/12/14)

1. Because questions of credibility are to be resolved by the trier of fact, it is generally improper to ask one witness to comment directly on the credibility of another witness. Here, a witness testified that the complainant had given her a "credible history."

The court rejected the State's argument that the witness' comment was unresponsive to the prosecutor's question, which did not explicitly seek a direct comment on the credibility of another witness. The court stressed that the State was responsible for adequately preparing its witnesses to ensure that they did not volunteer improper and prejudicial testimony.

In addition, the prosecutor adopted the witness's statement in closing argument by specifically mentioning her positive assessment of the complaint's credibility. This statement was intended to persuade the jury that it should defer to the State's witnesses in determining the credibility of the claims.

2. The prosecutor also erred by stating that "I do think" the complainant's statements are credible. It is prejudicial error for the prosecutor to express personal beliefs or opinions or to invoke the integrity of the State's Attorney's office to vouch for the credibility of a prosecution witness.

Because the State's case in a prosecution for sex offenses against a child was based on the credibility of minor witnesses, the court found that the evidence was closely balanced. Thus, the plain error rule applied. Because defendant was denied a fair trial by the cumulative effect of several errors including the erroneous admission of hearsay evidence, allowing a prosecution witness to testify concerning the credibility of the complainant, and commenting in closing argument on the credibility of witnesses, the convictions were reversed and the cause remanded for a new trial.

(Defendant was represented by Assistant Defender Allen Andrews, Springfield.)

People v. Gray, 406 Ill.App.3d 466, 941 N.E.2d 338 (1st Dist. 2010)

One of the prosecution witnesses testified by evidence deposition, as he was serving in the miliary in Iraq at the time of defendant's trial. The prosecutor argued to the jury, "Why would [the witness] come from Fort Benning, Georgia, and give his testimony on a videotaped statement knowing that he was about to be sent to Iraq to fight for his country if he was not coming in to tell the truth?"

The Appellate Court held that just as it is error to bolster the credibility of a police-officer witness by commenting that the officer risks his life to defend the public, it was error to argue that a soldier is credible because he risks his life for the public. Such comments only created sympathy for the witness because of the risk he faced fighting in Iraq.

(Defendant was represented by Assistant Defender Tomas Gonzalez, Chicago.)

People v. Mpulamasaka, 2016 IL App (2d) 130703 (No. 2-13-0703, 2/17/16)

The court found that the prosecutors committed error in several respects during closing argument, and that it was "reasonably certain that but for the errors . . . the jury's verdict would have been not guilty."

1. The prosecutors erred where they used evidence that had been introduced on a count for which a directed verdict had been granted to establish an element of another count. Although the trial court neglected to tell the jury that a directed verdict had been ordered on the count to which the evidence was relevant, and defense counsel failed to request such an instruction, that oversight "did not give the State license" to use the evidence to confuse the jury concerning the remaining charges.

2. Where defendant was charged with aggravated criminal sexual assault, the prosecutors erred by referring to him in closing argument as a "predator" who took "a piece of meat" home. "Each of these remarks was clearly improper and an attempt to cultivate anger toward defendant."

3. The prosecutors erred in closing argument by making statements which attacked the integrity and denigrated the testimony of a defense expert. Although the State did not challenge the expert's qualifications, it argued that he "was at the rent-a-doctor agency sipping a latte" and sold his integrity "for three pieces of silver." At the same time, the State misstated the expert's testimony.

The court noted that the trial court overruled defense objections to the argument, giving the jury the impression that the statements accurately described the expert's opinion. Furthermore, some of the improper remarks were made in the State's rebuttal, when the defense had no chance to respond.

4. The prosecutors erred by arguing that the complainant's testimony on cross-examination, which supported defendant's claim of consent, was the result of misleading and confusing questioning by defense counsel. There was no evidence that the complainant had any trouble understanding defense counsel's questions, and urging the jury to ignore the testimony on cross-examination because it was "not [the complainant's] words" violated the right to confront witnesses and the right to a fair trial.

5. The prosecutor engaged in misconduct by sitting at the witness stand in closing argument while arguing about the complainant's "courage in testifying" and commenting on defendant's credibility (despite the fact that defendant did not testify). "Whether intentionally or not, by arguing S.B.'s courage and then transitioning to defendant's credibility, the prosecutor might have reminded the jury that defendant did not testify, especially when the argument was made from the witness chair."

Furthermore, the tactic of "leaving the podium and sitting in the witness chair . . . was designed to evoke sympathy for [the complainant] and disgust for defendant." In rejecting the State's argument that defendant cited no authority that a party cannot sit in the witness chair during closing argument, the court stated: "There does not need to be a case precedent to establish that certain conduct is improper. Many practices and customs have been historically followed in the trial process."

The court concluded that even in the absence of a defense objection, the trial court

should have prevented the prosecutor from arguing from the witness stand.

6. Finally, the prosecution erred by ending its rebuttal with a "final appeal to sympathy" by calling defendant a "bully" who took advantage of the "weakest among us." "[G]uilty verdicts may not be based on sympathy."

(Defendant was represented by former Assistant Defender Barb Paschen, Elgin.)

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§41-12
Comments About the Defendant

People v. Caballero, 126 Ill.2d 248, 533 N.E.2d 1089 (1989) A prosecutor "may not give his own opinion as to the guilt of the accused unless the prosecutor states, or it is apparent, that the opinion is solely based on the evidence." It was improper in this case for the prosecutor to say that "I didn't go to law school to put innocent men in the penitentiary . . . this man is guilty."

People v. Johnson, 119 Ill.2d 119, 518 N.E.2d 100 (1987) "It is improper to characterize a defendant as an 'animal' even where that characterization is based upon the evidence." See also, **People v. Caballero**, 126 Ill.2d 248, 533 N.E.2d 1089 (1989); **People v. Coleman**, 129 Ill.2d 321, 544 N.E.2d 330 (1989).

People v. Lucas, 132 Ill.2d 399, 548 N.E.2d 1003 (1989) It was improper for the prosecutor to say that defendant "lived off" his mother and other women. These comments had no relevance to guilt or innocence, but could arouse and inflame the passions of the jury.

People v. Cloutier, 178 Ill.2d 141, 687 N.E.2d 930 (1997) The prosecutor erred at a death penalty hearing by asserting that because defendant had gotten "overly lenient treatment" from the criminal justice system in the past he should be punished more severely now. See also, **People v. Williams**, 161 Ill.2d 1, 641 N.E.2d 296 (1994) (error at death hearing to argue that prior voluntary manslaughter should have been more severe conviction; prosecutor agreed to earlier plea agreement); **People v. Hooper**, 172 Ill.2d 64, 665 N.E.2d 1190 (1996) (prosecutor argued defendant had committed five prior murders; one offense had been manslaughter plea); **People v. Mulero**, 176 Ill.2d 444, 680 N.E.2d 1329 (1997) (prosecutor erred by arguing that because the defense had used a "legal maneuver" (i.e., filing a motion to suppress), defendant's claim of remorse should be rejected).

People v. Barney, 176 Ill.2d 69, 678 N.E.2d 1038 (1997) Due process is not violated where the prosecutor argues that the defendant has an interest in the outcome of the case merely because he is the defendant. A party is permitted to argue that a witness has an interest or bias in testifying. The suggestion that a defendant's testimony may be biased because he is interested in the outcome of the case does not tell the jurors "anything they do not know and are not already thinking." Finally, pointing out the defendant's interest in being acquitted does not unfairly erode the presumption of innocence.

People v. Nicholas, 218 Ill.2d 104, 842 N.E.2d 674 (2005) The court concluded that the prosecutor did not err by referring in closing argument to defendant's conduct during the

offense as "pure evil." Although a prosecutor may not characterize the defendant as a "evil" person or cast the jury's decision as a choice between "good and evil," the prosecutor's statements referred to specific actions by the defendant and referenced an argument that the facts proved the defendant's guilt. The court also held that the plain error rule did not apply where the evidence of guilt was overwhelming and the arguments did not deny a fair trial.

People v. Maounis, 309 Ill.App.3d 155, 722 N.E.2d 749 (1st Dist. 1999) The prosecutor committed plain error in closing arguments by urging the jury to convict defendant of armed robbery because he had not spent the Christmas holidays at home with his wife and daughter.

People v. Strange, 125 Ill.App.3d 43, 465 N.E.2d 616 (1st Dist. 1984) The prosecutor committed plain error by calling defendant a "liar" in closing argument and by saying that he wished the jury had a "built-in-shockproof B.S. detector." Defendant's testimony was not inconsistent with that of other witnesses; thus, the argument "has no basis in the record."

People v. Lee, 128 Ill.App.3d 774, 471 N.E.2d 567 (1st Dist. 1984) The prosecutor improperly called the defendant a "con-man" for not requesting psychiatric help until after his arrest, when he "had the advice of counsel," and by labeling defendant a liar.

People v. Ray, 126 Ill.App.3d 656, 467 N.E.2d 1078 (1st Dist. 1984) The prosecutor improperly suggested that defendant "was manipulating his constitutional rights to escape conviction." The prosecutor stated that defendant "hid behind those rights," had used the Constitution as a shield for "a year," and was represented by public defenders "who are part of the elite murder task force . . . who defend murderers for a job."

People v. Meredith, 84 Ill.App.3d 1065, 405 N.E.2d 1306 (1st Dist. 1980) Prosecutor's comment in closing argument (that the defendant telephoned his attorney on the morning after the incident) was reversible error. The comment was "intended to raise an adverse inference of defendant's guilt in the minds of the jurors . . . and penalized defendant" for exercising a constitutional right. See also, **People v. Moman**, 201 Ill.App.3d 293, 558 N.E.2d 1231 (1st Dist. 1990) (improper to cross-examine defendant and comment in closing argument on fact that defendant met with his attorney before testifying).

People v. Thomas, 22 Ill.App.3d 854, 318 N.E.2d 342 (1st Dist. 1974) In objecting to a defense question concerning the police seeking permission to search defendant's home, the prosecutor stated that "this officer doesn't have to ask a criminal permission for anything." The Court found the above remark to be prejudicial though the jury was told to disregard the word "criminal." It is clearly reversible error for a prosecutor to suggest to a jury that a defendant has committed other offenses unrelated to the one for which he is being tried.

People v. Slaughter, 84 Ill.App.3d 88, 404 N.E.2d 1058 (3d Dist. 1980) At defendant's trial for escape, the prosecutor informed the jury that defendant was serving a 100 to 300 year sentence for murder. The Court held that the prosecutor's repeated assertions concerning the defendant's conviction and the length of sentence were improper and "served no other purpose than, potentially, to inflame the passions of the jury and prejudice the defendant in their eyes."

People v. Liberg, 138 Ill.App.3d 986, 486 N.E.2d 973 (2d Dist. 1985) The prosecutor properly

argued that defendant concocted his insanity defense where the evidence supported the inference that defendant manufactured his symptoms.

People v. Nwadiei, 207 Ill.App.3d 869 566 N.E.2d 470 (1st Dist. 1990) In a prosecution for charges including conspiracy to submit fraudulent Medicare billings, the State repeatedly argued that because the defendant had associated with two State's witnesses who were self-confessed criminals, he was also a criminal. The Court found this argument to be erroneous because the prosecution had not argued the association in order to prove conspiracy, but merely to persuade the jury that the defendant was a man of bad character.

People v. Jendras, 216 Ill.App.3d 149, 576 N.E.2d 229 (1st Dist. 1991) The defendant, a teacher, was convicted in a bench trial of the aggravated criminal sexual abuse of a male student. At one point, while in the presence of the judge, the prosecutor turned to the defendant, gestured toward the courtroom door, and said, "Homosexuals first." In addition, during cross-examination the prosecutor asked defendant whether he wore very tight pants and whether God forgave him his sins. The Court held that the prosecutor's comments were inappropriate, but were not reversible error because the trial judge recognized that defendant's lifestyle was not at issue. The judge cut off questions pertaining to defendant's homosexuality, and when the prosecutor argued that homosexuality "goes right to the root of his moral character," the judge responded, "Homosexuality is not against the law. Who cares?" At another point the judge stated that he was ignoring the "elements of the defendant's lifestyle [that] were injected into the case" and that defendant's lifestyle was "totally irrelevant." Because the trial judge clearly ignored the prosecutor's statements, reversal was not required.

People v. Quiroz, 257 Ill.App.3d 576, 628 N.E.2d 542 (1st Dist. 1993) At his trial for first degree murder, defendant testified that he was a member of the Satan Disciples street gang and that the offense occurred after he was beaten by rival gang members. Defense counsel argued that the defendant had been acting in sudden and intense passion and should therefore be convicted of second degree murder. The Court found that the prosecutor erred during closing argument when he referred to defendant as a 'Disciple of Satan.' "Sarcastic comments designed to stir religious feeling push beyond the bounds of proper courtroom decorum. . . . Instead of drawing upon the evidence presented at trial, the prosecutor denounced the defendant by drawing upon religious imagery with no relevance to the facts of the case."

People v. McCorkle, 239 Ill.App.3d 1014, 607 N.E.2d 296 (3d Dist. 1993) At defendant's trial for the aggravated criminal sexual abuse of a 16-year-old, the State introduced evidence that he started dating his ex-wife when she was 16 and he was 36. In closing argument, the prosecutor asked why someone in defendant's position would go after "jail bait," and said that defendant had done the same thing when he started dating his ex-wife. The admission of evidence about defendant's ex-wife was plain error. The Court found that the prosecutor "greatly exacerbated" the prejudice of that evidence by asserting that defendant had been attracted to "jail bait" before.

People v. Davis, 287 Ill.App.3d 46, 677 N.E.2d 1340 (1st Dist. 1997) The prosecutor improperly disparaged the defense by crumpling a defense exhibit and stating, "This is how worthless this piece of paper is."

People v. Adams, 2012 IL 111168 (No. 111168, 1/20/12)

1. Noting a conflict in Illinois authority, the Supreme Court found that the prosecutor erred in closing argument by stating, in the absence of any evidence concerning the consequences of a police officer lying in court, that police officers would not risk their "credibility," "jobs," and "freedom" by lying in court. The court noted that the weight of authority from other jurisdictions holds that such comments are improper, and concluded that in the absence of evidence from which it could be inferred that testifying officers risk their careers if they testify falsely, such comments are impermissible speculation. Furthermore, such argument implies that a police officer has a greater reason to testify truthfully than a witness with some other type of occupation, and violates the principle that a prosecutor may not argue that a witness is more credible because of his or her status as a police officer.

2. However, the improper remarks were not plain error where defendant's testimony was highly improbable, the jury was properly instructed that counsel's arguments were not evidence and that the jury was to judge credibility, and the comments did not affect the fairness of the trial to the extent that the integrity of the judicial process was threatened.

3. The prosecutor did not act improperly by arguing that the defendant had "two and a half years to come up with the story he told you today." The court found that remark did not violate **Doyle v. Ohio**, 426 U.S. 610 (1976), which holds that once a defendant has received **Miranda** warnings due process prohibits prosecutorial comments on post-arrest silence for purposes of impeachment. The court concluded that the prosecutor's argument was not impeachment of defendant's exculpatory testimony by use of his earlier silence; "instead, [the prosecutor] commented on petitioner's credibility as a witness by alluding to petitioner's opportunity to perfect his account." (Quoting **Melendez v. Scribner**, 2006 WL 2520301 (E.D. Cal. 8/3/06)).

(Defendant was represented by Assistant Defender Bryon Kohut, Ottawa.)

People v. Glasper, 234 Ill.2d 173, 917 N.E.2d 401 (2009)

The court rejected defendant's argument that plain error occurred where the prosecutor made several allegedly improper remarks. The court found that the majority of the remarks were either invited by the defense or proper under the evidence. However, the prosecutor erred by stating to the jury that the job of the foreperson was to "keep everybody on track" and prevent consideration of any "wild unsubstantiated theory" that was not supported by the evidence.

The court concluded that the prosecutor's statement "amounted" to an instruction to the foreperson to forbid discussion of the defense theory that defendant had been coerced into confessing. However, the court found that the improper remarks were harmless because they would not have overcome the effect of the trial court's proper jury instructions.

In addition, the prosecutor erred by comparing the conditions of defendant's police interrogation with jury service, and asking whether any of the jurors were "ready to confess to a murder you didn't commit?" Although the remark was irrelevant and had no purpose other than to distract the jurors from the case, it was not so prejudicial as to cause the jury to ignore the trial court's instructions. (See also **JURY**, §32-4(a)).

Defendant's conviction for first degree murder and attempted first degree murder was affirmed, as were the consecutive sentences of 80 and 30 years.

(Defendant was represented by Assistant Defender Elizabeth Botti, Chicago.)

People v. Mpulamasaka, 2016 IL App (2d) 130703 (No. 2-13-0703, 2/17/16)

The court found that the prosecutors committed error in several respects during closing argument, and that it was "reasonably certain that but for the errors . . . the jury's verdict would have been not guilty."

1. The prosecutors erred where they used evidence that had been introduced on a count for which a directed verdict had been granted to establish an element of another count. Although the trial court neglected to tell the jury that a directed verdict had been ordered on the count to which the evidence was relevant, and defense counsel failed to request such an instruction, that oversight "did not give the State license" to use the evidence to confuse the jury concerning the remaining charges.

2. Where defendant was charged with aggravated criminal sexual assault, the prosecutors erred by referring to him in closing argument as a "predator" who took "a piece of meat" home. "Each of these remarks was clearly improper and an attempt to cultivate anger toward defendant."

3. The prosecutors erred in closing argument by making statements which attacked the integrity and denigrated the testimony of a defense expert. Although the State did not challenge the expert's qualifications, it argued that he "was at the rent-a-doctor agency sipping a latte" and sold his integrity "for three pieces of silver." At the same time, the State misstated the expert's testimony.

The court noted that the trial court overruled defense objections to the argument, giving the jury the impression that the statements accurately described the expert's opinion. Furthermore, some of the improper remarks were made in the State's rebuttal, when the defense had no chance to respond.

4. The prosecutors erred by arguing that the complainant's testimony on cross-examination, which supported defendant's claim of consent, was the result of misleading and confusing questioning by defense counsel. There was no evidence that the complainant had any trouble understanding defense counsel's questions, and urging the jury to ignore the testimony on cross-examination because it was "not [the complainant's] words" violated the right to confront witnesses and the right to a fair trial.

5. The prosecutor engaged in misconduct by sitting at the witness stand in closing argument while arguing about the complainant's "courage in testifying" and commenting on defendant's credibility (despite the fact that defendant did not testify). "Whether intentionally or not, by arguing S.B.'s courage and then transitioning to defendant's credibility, the prosecutor might have reminded the jury that defendant did not testify, especially when the argument was made from the witness chair."

Furthermore, the tactic of "leaving the podium and sitting in the witness chair . . . was designed to evoke sympathy for [the complainant] and disgust for defendant." In rejecting the State's argument that defendant cited no authority that a party cannot sit in the witness chair during closing argument, the court stated: "There does not need to be a case precedent to establish that certain conduct is improper. Many practices and customs have been historically followed in the trial process."

The court concluded that even in the absence of a defense objection, the trial court should have prevented the prosecutor from arguing from the witness stand.

6. Finally, the prosecution erred by ending its rebuttal with a "final appeal to sympathy" by calling defendant a "bully" who took advantage of the "weakest among us." "[G]uilty verdicts may not be based on sympathy."

(Defendant was represented by former Assistant Defender Barb Paschen, Elgin.)

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§41-13
Comments About Defense Counsel

People v. Monroe, 66 Ill.2d 317, 362 N.E.2d 295 (1977) The prosecutor's closing argument (in which he accused defense counsel of character assassination and presenting a preposterous defense) exceeded the bounds of proper courtroom decorum and deprived defendant of a fair trial.

People v. Weathers, 62 Ill.2d 114, 338 N.E.2d 880 (1975) Reversible error to charge that defense lawyers were lying and attempting to create a reasonable doubt by confusion and misrepresentation. See also, **People v. Stock**, 56 Ill.2d 461, 309 N.E.2d 19 (1974).

People v. Emerson, 97 Ill.2d 487, 455 N.E.2d 41 (1983) The prosecutor stated in closing argument that defense counsel had laid down a smokescreen "composed of lies and misrepresentation and innuendoes." He also stated that all defense attorneys try to "dirty up the victim," to distract the attention of the jury from the defendant's crime, and want to walk the defendants out of court and put them back on the street. The Court held that the above remarks were improper. Unless based upon the evidence, it is improper to suggest that defense counsel fabricated a defense theory, attempted to free his client through trickery or deception, or suborned perjury. Additionally, the remarks improperly shifted the focus of attention from the evidence to the objectives of trial counsel. See also, **People v. Thomas**, 116 Ill.App.3d 216, 452 N.E.2d 77 (1st Dist. 1983).

People v. Kidd, 147 Ill.2d 510, 591 N.E.2d 431 (1992) During rebuttal argument in an arson case, the prosecutor referred to the defense as a "smoke screen," said that the defense was trying to "fill this courtroom with smoke," and argued that the defense hoped the jury would "get lost in the smoke" and that "smoke" would "strangle the truth." The prosecutor also referred to the defense "throwing out their puffs of smoke" and said that the jury had to "cut through the smoke." The Court found that the prosecutor's comments were inappropriate and extremely prejudicial. Courts have repeatedly condemned the comparison of the defense to a "smoke screen," and here the prosecutor made not a fleeting or inadvertent remark but repeated the argument eight times. Because defendant was charged with an arson in which ten children died, repeatedly referring to defense arguments in terms of "smoke" was especially prejudicial.

People v. Phillips, 127 Ill.2d 499, 538 N.E.2d 500 (1989) The prosecutor stated "it is the weaknesses that expose this defense as nothing more than a fraud." He also criticized the defense as "a type of trickery." Defense counsel objected and the trial judge instructed the jury to "disregard fraud and trickery." Later, after discussing certain defense evidence, the prosecutor stated: "It is all part of a shotgun defense. Throw that out and see what sticks. It is nothing more than a red herring intended to distract you from the real issues in the case." The Court held that the above comments were not plain error. The prosecutor's comments were not an attempt to impugn the defense counsel, but were allowable references to relevance and credibility.

People v. Thompson, 313 Ill.App.3d 510, 730 N.E.2d 118 (1st Dist. 2000) The prosecutor

erred in closing argument by stating that three witnesses went to defense counsel's office because counsel's partner was "the leg man" who was "going to get the [witnesses] . . . to change their testimony" so defense counsel could "fix the case." Courts have consistently condemned comments disparaging the integrity of defense counsel and implying that the defense has been fabricated at counsel's direction. "The clear implication of these comments was that defendant and defense counsel were engaged in a nefarious plan to obtain witness recantations and to 'fix' defendant's case." The error was not harmless although the court sustained an objection and admonished the jury to disregard the argument.

People v. Triplett, 99 Ill.App.3d 1077, 425 N.E.2d 1236 (1st Dist. 1981) The prosecutor told the jury that,"defense counsel's argument nauseated him, ridiculed the jury's intelligence, was demeaning, calculated and contrived, and was an attempt to install fear in the jury." The prosecutor also "insinuated that defense counsel was a liar and stated that defense counsel played with the jurors' minds." The Court stated that the above remarks "far exceeded the bounds of proper conduct" and "should not be repeated on retrial."

People v. Moore, 172 Ill.App.3d 325, 526 N.E.2d 591 (1st Dist. 1988) It was improper for the prosecutor to say that defense counsel had spread "horse manure" around the courtroom.

People v. Shaw, 98 Ill.App.3d 682, 424 N.E.2d 834 (1st Dist. 1981) Prosecutor stated that "these defense lawyers are hired guns" and were "paid to do a job to mislead you, to confuse you, and that's exactly what has happened here." The prosecutor also referred to defense counsel as a "fraud." The comments were found to be improper but harmless. See also, **People v. Hawkins**, 284 Ill.App.3d 1011, 675 N.E.2d 642 (1st Dist. 1996) (reversible error to refer to defense counsel as "paid advocate").

People v. Rader, 178 Ill.App.3d 453, 532 N.E.2d 1365 (1st Dist. 1988) It was improper for the prosecutor to say: "We're not here to suborn perjury . . . our sworn duty is to present the evidence to you and that is what we did here. Now you don't have to be real smart to figure out what [defense counsel's] job is here."

People v. Holloway, 119 Ill.App.3d 1014, 457 N.E.2d 466 (1st Dist. 1983) It was improper for the prosecutor to tell the jury "not to be swayed by a clever defense attorney" and to label the defense theory as "the oldest trick in the book."

People v. Rodriguez, 134 Ill.App.3d 582, 480 N.E.2d 1147 (1st Dist. 1985) It was improper for the prosecutor to tell the jury that it was defense counsel's job "to try to get his client off" and that defense counsel had lied in his argument.

People v. Lundell, 182 Ill.App.3d 417, 538 N.E.2d 186 (3d Dist. 1989) It was improper for the prosecutor to say that defendant and his counsel were "trying to concoct this issue of insanity," that defense counsel "would misstate the evidence," and that defense counsel "is trying to get him off by creating this issue of insanity and obscuring the facts on that issue."

People v. Ray, 126 Ill.App.3d 656, 467 N.E.2d 1078 (1st Dist. 1984) The prosecutor erred by "repeatedly attack[ing] the integrity of defense counsel, charging him with 'lying' some sixteen times, and with trying to 'confuse' and 'intimidate' the jury to win defendant's acquittal."

People v. Weinger, 101 Ill.App.3d 857, 428 N.E.2d 924 (1st Dist. 1981) A defense witness, who had advised other witnesses not to talk to the police, stated that he had once attended a course taught by defense counsel. The prosecutor then questioned the witness in a way suggesting defense counsel had taught him to interfere with police. In closing argument the prosecutor stated: "What kind of course did you learn in law school that teaches you to subvert a police investigation." The Court held that the questioning and comment were improper since they insinuated that defense counsel taught the witness how to subvert a police investigation.

People v. Aguirre, 291 Ill.App.3d 1028, 684 N.E.2d 1372 (2d Dist. 1997) The prosecutor improperly suggested that the defense was fabricated where she asked whether defendant or counsel had "come up with the story that we heard today?"

Cumulative Digest Case Summaries **§41-13**

People v. Mpulamasaka, 2016 IL App (2d) 130703 (No. 2-13-0703, 2/17/16)

The court found that the prosecutors committed error in several respects during closing argument, and that it was "reasonably certain that but for the errors . . . the jury's verdict would have been not guilty."

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The court noted that the trial court overruled defense objections to the argument, giving the jury the impression that the statements accurately described the expert's opinion. Furthermore, some of the improper remarks were made in the State's rebuttal, when the defense had no chance to respond.

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prosecutor might have reminded the jury that defendant did not testify, especially when the argument was made from the witness chair."

Furthermore, the tactic of "leaving the podium and sitting in the witness chair . . . was designed to evoke sympathy for [the complainant] and disgust for defendant." In rejecting the State's argument that defendant cited no authority that a party cannot sit in the witness chair during closing argument, the court stated: "There does not need to be a case precedent to establish that certain conduct is improper. Many practices and customs have been historically followed in the trial process."

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(Defendant was represented by former Assistant Defender Barb Paschen, Elgin.)

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§41-14
Racial Comments

People v. Dukett, 56 Ill.2d 432, 308 N.E.2d 590 (1974)The prosecutor stated defendants went "to Negro bars [and] I think . . . that a person who frequents those kind of places is going to be a person different than reasonable persons . . . [and] is a kind of person who would carry a pistol and if there was trouble the first thing he'd go for would be his pistol." The prosecutor also said that it was "interesting . . . that two Negroes were brought from St. Louis to testify [for defendant]." The Court found the comments improper; "appeals to racial prejudice, whether open or oblique, discredit our justice and are to be condemned." See also, **People v. Richardson**, 49 Ill.App.3d 170, 363 N.E.2d 924 (5th Dist. 1977) (depicting defense witnesses as liars because they would perjure themselves to help a member of the same race); **People v. Turner**, 52 Ill.App.3d 738, 367 N.E.2d 1365 (4th Dist. 1977) (stating that a black witness was "going to have a good time watching two black girls beat up whitey.")

People v. Johnson, 114 Ill.2d 170, 499 N.E.2d 1355 (1986) The prosecutor's reference to defendant as "that black man" was "unnecessary and potentially offensive."

People v. Brown, 170 Ill.App.3d 273, 524 N.E.2d 742 (2d Dist. 1988) The prosecutor injected race into his closing argument by referring to the complainant as "this little black woman" and saying that everyone is entitled to the same protection "whether they're white or black."

People v. Lurry, 77 Ill.App.3d 108, 395 N.E.2d 1234 (3d Dist. 1979) At an attempt murder trial, the prosecutor referred to "black crimes" and said that defendant wanted to make Joliet like Detroit, which the prosecutor described as the "murder capital of the country" and "a city of fear." He also argued that an acquittal would "invite an open season for shooting victims" and encourage "those people" to commit more violent crimes. The Court found the remarks to be an improper "appeal to the jury based upon racial overtones and racial problems."

People v. Sales, 151 Ill.App.3d 226, 502 N.E.2d 1221 (1st Dist. 1986) In closing argument the prosecutor argued that the black defendants were racially motivated in attacking the white victim. The Court held that there was no evidentiary support for this argument.

People v. Marshall, 2013 IL App (5th) 110430 (No. 5-11-0430, 9/13/13)

Courts have consistently condemned the introduction of race into a prosecutor's arguments. A prosecutor also may not argue facts that are not based on evidence in the record or align himself with the jury, effectively making himself a thirteenth juror.

The Appellate Court found plain error where a consistent theme of the prosecutor's argument in both opening and closing statements to the jury was the "culture of the black community," where people were raised to believe that the police and prosecutors are the enemy and the biggest sin that you could commit was to be a snitch. These arguments arbitrarily injected race into the jury's deliberations and had no bearing on the credibility of the State's witnesses. The comments were "naked prejudice" with no basis in the evidence. By contrasting the "black community" with "our white world," the prosecutor also improperly aligned himself with the jury.

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§41-15
Comments About the Victim and Victim's Family

People v. Moss, 205 Ill.2d 139, 792 N.E.2d 1217 (2001) The Supreme Court affirmed defendant's convictions and death sentence, but criticized the prosecutor for: (1) repeatedly referring to the children of one of the decedents, (2) stating that defendant's rights had been protected by a trial although the victims' rights had not been protected, (3) saying that the jury's verdict was the only way that the decedents could "be heard," and (4) arguing that one of the decedents (an 11-year-old complainant in an alleged sex offense committed by the defendant) would have been in court to testify had the defendant not made sure that "neither she nor her mother would ever walk into a court of law" and that she would never "lace her shoes up again, . . ."

People v. Emerson, 189 Ill.2d 436, 727 N.E.2d 302 (2000) Although the errors were not sufficiently inflammatory to require resentencing, the prosecutor acted improperly at the second stage of a death hearing by referring to the decedent's "hopes and dreams," describing mitigating evidence as a "con job" in which a defense expert had participated, and denouncing the expert as a "hired gun" whose testimony was "babble."

People v. Harris, 225 Ill.2d 1, 866 N.E.2d 162 (2007) The court concluded that the prosecutor erred in opening statements by referring to two decedents as "father[s] and husband[s]." Although the comments were erroneous, reversal was not required where the comments were not dwelled upon, no attempt was made to "relate defendant's punishment to the existence of the victims' family," objections to the comments were sustained, and the jury was instructed that arguments of counsel are not evidence. Under these circumstances, there was insufficient prejudice to require reversal. The court also rejected the argument that it was error for the

State to elicit references to the victims' families during testimony of three witnesses. The court found that no error occurred. Although it is improper to present evidence of the decedent's family in a way that leads the jury to believe that such evidence is material, not every mention of a deceased's family is reversible error. The court found that no error occurred where the evidence was elicited for relevant purposes - to prove the witnesses' background and relationship to the decedents and to explain other evidence - and where the testimony was brief and "consisted solely of introductory, background" questions.

People v. Urdiales, 225 Ill.2d 354, 871 N.E.2d 669 (2007) Although the prosecutor erred during closing arguments by referring to the decedents' families, the Supreme Court found that the remarks were not so prejudicial as to deny a fair sentencing hearing.

People v. Neal, 111 Ill.2d 180, 489 N.E.2d 845 (1985) At defendant's jury trial for murder and armed robbery, the prosecutor made a "passing reference" in closing argument "to the victim's children and grandchildren to the effect that they were left without a grandmother." The Court found that argument that "the deceased left a family is improper, as it has no bearing on the guilt or innocence of the accused." However, the Court held that the "fleeting remark" here, "considering the evidence, did not constitute reversible error."

People v. Caballero, 126 Ill.2d 248, 533 N.E.2d 1089 (1989) It was improper at a murder trial for the prosecutor to comment that the victim's mother "will never see her son" and that another mother "will not see her two sons." These comments "were more than incidental references to the victims' families; they verged upon the kind of detailed discussion of the deceased's victim's families which have previously condemned." See also, **People v. Jimerson**, 127 Ill.2d 12, 535 N.E.2d 889 (1989); **People v. Mapp**, 283 Ill.App.3d 979, 670 N.E.2d 852 (1st Dist. 1996) (error to argue that decedent would never see his children grow or spend his life with his fiancee).

People v. Thomas, 137 Ill.2d 500, 561 N.E.2d 57 (1990) The prosecutor pointed out that the victim was killed on the day before Thanksgiving and that she had planned "to spend Thanksgiving with her family." The Court held that this comment, which was "incidental and not calculated," made "in passing" and not dwelled upon, was neither flagrant nor inflammatory. See also, **People v. Simms**, 121 Ill.2d 259, 520 N.E.2d 308 (1988) (isolated reference to the victim's family did not deny defendant a fair trial); **People v. Bae**, 176 Ill.App.3d 1065, 531 N.E.2d 931 (1st Dist. 1988) (no reversible error where references were brief and the judge immediately sustained a defense objection).

People v. Faysom, 131 Ill.App.3d 517, 475 N.E.2d 945 (1st Dist. 1985) A prosecutor's suggestion that a jury consider the victim's family as a material factor in its deliberations is improper, as is an argument intimating that the victim's family deserves the jurors' sympathy.

People v. Beringer, 151 Ill.App.3d 558, 503 N.E.2d 778 (1st Dist. 1987) It was improper for the prosecutor to comment "about the victim's rights. What about her right to grow old, to have a family[?] . . . I'm not asking you to convict on [sympathy], but my client who didn't have a lawyer before she was destroyed; she didn't have a jury trial before she was taken out." These remarks were "designed to arouse the sympathy and passions of the jurors."

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§41-16
Special Prosecutor

People v. Morley, 287 Ill.App.3d 499, 678 N.E.2d 1235 (2d Dist. 1997) Defendant was convicted of several offenses stemming from a shootout with two police officers. After the convictions were reversed defendant moved for appointment of a special prosecutor because the complainant had been hired by the State's Attorney's office as an investigator. The motion alleged that the prosecutor assigned to conduct defendant's retrial had played "a leading role in the decision to employ" the complainant and supervised the complainant in his work. The evidence at the hearing showed that the complainant did not serve subpoenas or talk to witnesses in this case. The Appellate Court held that the trial court did not err by refusing to appoint a special prosecutor. Whether such a prosecutor should be appointed rests in the discretion of the trial court. A special prosecutor is required only where the elected State's Attorney is: (1) interested as a private individual, or (2) an actual party to the litigation. Appointment of a special prosecutor is not required whenever victims or witnesses are employed by the State's Attorney's office. " Since the prosecutor assigned to represent the State in defendant's retrial was not an "actual party" to the case and had no private individual interest in the litigation, the trial court did not abuse its discretion by refusing to appoint a special prosecutor. Compare, **People v. Courtney**, 288 Ill.App.3d 1025, 687 N.E.2d 521 (3d Dist. 1997) (appointment of special prosecutor required where defendant's former trial counsel became the head of the office prosecuting the case).

People v. Lang, 346 Ill.App.3d 677, 805 N.E.2d 1249 Under 55 ILCS 5/3-9008, a special prosecutor may be appointed where the State's Attorney is "interested" in a case. The State's Attorney is deemed to be "interested" not only where he or she is an actual party to the litigation or interested as a private individual, but also where a special prosecutor is necessary to remove an appearance of impropriety. Appointment of a special prosecutor may be required even if the defendant is unable to demonstrate actual prejudice from the participation of the elected State's Attorney in the case. In determining whether to appoint a special prosecutor, the trial court must weigh the appearance of impropriety against factors such as: (1) the burden that would be placed on the prosecutor's office if the entire office had to be disqualified, (2) the remoteness of the connection between the State's Attorney's office and the alleged conflict of interest, and (3) the extent to which the public is aware of the alleged conflict.

The trial court erred by denying defendant's motion for appointment of a special prosecutor on a charge of driving on a revoked license. An Assistant State's Attorney followed defendant to a parking ramp after a court appearance on a separate charge, hid from defendant's view, observed defendant operate a motor vehicle, and reported his observations to a police officer. Despite a court order disqualifying him from appearing in the case, the Assistant appeared on behalf of the State at 23 pretrial hearings. A different Assistant represented the prosecution at defendant's trial, at which the original Assistant was the only witness. The court concluded that the trial court abused its discretion by denying the motion for appointment of a special prosecutor:

> We believe that these facts create an improper appearance that the State was too involved with the underlying case to be fair in its prosecution of the defendant. Although the Assistant State's Attorney's pursuit of the defendant was not wrong in itself, his

> aggressive behavior toward the defendant created the appearance that the State's Attorney's office was obsessed with finding evidence against the defendant to obtain a conviction against him at all costs. . . [T]he facts herein suggest that a special prosecutor should have been appointed so as to not risk diminishing the public's esteem and confidence in the criminal justice system.

The court noted that there were no countervailing considerations outweighing the need for a special prosecutor - the alleged conflict involved one of the Assistant State's Attorneys, was not remote, and could not be shielded from the jury once the Assistant State's Attorney testified as a State's witness. Furthermore, appointment of a special prosecutor would have had little adverse effect on the prosecutor's office:

> We believe that it is a rare case in which an Assistant State's Attorney will surreptitiously follow a defendant and then become the key witness against him at trial. In those rare cases, we believe that the importance of maintaining the public's esteem for the State's Attorney's office and the integrity of the criminal justice system outweighs the resulting inconvenience to that State's Attorney's office.

People v. Woodall, 333 Ill.App.3d 1146, 777 N.E.2d 1014 (5th Dist. 2002) Under **People v. Ward**, 326 Ill.App.3d 897, 762 N.E.2d 685 (5th Dist. 2002), attorneys employed by the State's Attorney Appellate Prosecutor's office may appear in trial court proceedings only as specifically authorized by the act which created the office. At the time of the proceedings in this case, that act authorized trial court appearances for certain drug offenses and forfeiture actions, proceedings under the Illinois Public Relations Act, and tax objections. A document by which the county's elected State's Attorney attempted to appoint SAAP attorneys as Special Assistant State's Attorneys was ineffective where the appointments had not been authorized by the county board, which could be obligated to provide funding, were not in accordance with 55 ILCS 5/3-9008, which limits special prosecutors to those appointed by the trial judge due to a conflict of interest or inability to appear by the elected State's Attorney, and were for "special" assistants rather than one of the Assistant State's Attorney's positions which the county board may create. However, defendant waived the issue by failing to object in the trial court or show that he was prejudiced. In addition, prosecution by attorneys who were not authorized to act in the State's Attorney's place did not deprive the trial court of either personal or subject matter jurisdiction.

People v. Bickerstaff, 403 Ill.App.3d 347, 941 N.E.2d 896 (2d Dist. 2010)

1. Under 55 ILCS 5/3-9008, the trial court may appoint a Special Prosecutor when "the State's Attorney is sick or absent, or unable to attend, or is interested in any cause or proceeding . . . which it is or may be his duty to prosecute or defend." Whether a Special Prosecutor should be appointed is left to the trial court's discretion.

2. A State's Attorney is "interested" for purposes of §5/3-9008 if he or she is interested in the litigation as a private individual or as an actual party, or if participation in the prosecution would create an appearance of impropriety. In determining whether a State's

Attorney's office should be removed in order to alleviate the appearance of impropriety, a court must weigh concern about the appropriateness of allowing the office to prosecute the case against any "countervailing considerations," including the burden that would be placed on the prosecutor's office if the entire office had to be disqualified, the remoteness of the connection between the State's Attorney's office and the conflict of interest, and the extent to which the public is aware of the conflict.

3. The trial court did not abuse its discretion by denying a motion to appoint a Special Prosecutor. During a campaign for State's Attorney, the newly-elected State's Attorney had extensively criticized his predecessor's handling of the defendant's case. The court rejected the argument that the criticism of the incumbent State's Attorney provoked public condemnation of the defendant, noting that the criticism related to the handling of a search warrant and not to defendants' guilt or innocence. The court found that the candidate did not become so involved in the prosecution that he exceeded his role as a prosecutor. Furthermore, whether the candidate violated any ethical rules was a matter for ARDC and did not control whether a Special Prosecutor should be appointed.

Finally, although it may have been "inappropriate" to allow a campaign web site discussing defendant's prosecution to remain active after the election, the site was deactivated as soon as the defense raised the issue. The court concluded that neither the continued operation of the web site, nor the candidate's discussion of evidence which had been excluded from trial, created an inference of impropriety which required the appointment of a Special Prosecutor.

People v. Max, 2012 IL App (3d) 110385 (No. 3-11-0385, 11/19/12)

A court may appoint a special prosecutor pursuant to 55 ILCS 5/3-9008 to prevent any influence upon the discharge of the State's Attorney's duties by reason of personal interest. A State's Attorney is "interested" in a cause or proceedings only if: (1) he is an actual party in the litigation; or (2) he is interested in the cause or proceedings as a private individual. The appointment of a special prosecutor may also be appropriate where necessary to remove the appearance of impropriety in the prosecution of a defendant or to promote the underlying policy of a just, fair, and impartial proceeding. Mere speculation or suspicion is not enough to justify the appointment of a special prosecutor. The determination of whether to appoint a special prosecutor rests within the sound discretion of the trial court and will not be reversed on appeal absent an abuse of discretion.

It was not error to fail to appoint a special prosecutor based on the fact that: (1) the county sheriff whose office investigated the case against defendant was the brother of the alleged victim; (2) the sheriff had a business relationship with the victim; and (3) the victim made a campaign contribution to the State's Attorney in a non-election year after the defendant was convicted. Neither the State's Attorney nor any member of his office was an actual party, witness, or victim. There was no evidence that the State's Attorney had a personal or individual interest in the case. The court did not abuse its discretion in finding no appearance of impropriety based on the sheriff's relationship to the victim and the campaign contribution to the State's Attorney.

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